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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

OF THE

STATE OF MISSOURI

REPORTED FOR THE

ST. LOUIS COURT OF APPEALS

June 4, 1912 to July 19, 1912.

By THOMAS E. FRANCIS of the St. Louis Bar.

FOR THE

KANSAS CITY COURT OF APPEALS

April 29, 1912 to November 11, 1912.

By JOHN M. CLEARY of the Kansas City Bar.

AND FOR THE

SPRINGFIELD COURT OF APPEALS

By LEWIS LUSTER of the Springfield Bar,

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HON. HENRY S. CAULFIELD, } *Judges.*

JOSEPH FLORY, *Clerk.*

THOMAS E. FRANCIS, *Reporter.*

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KANSAS CITY COURT OF APPEALS.

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HON. JAMES M. JOHNSON, } *Judges.*

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LEWIS LUSTER, *Reporter.*

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1912.

MARY E. ROBERTS, Respondent, v. CITY OF
PIEDMONT, Appellant.

St. Louis Court of Appeals. Submitted on Briefs May 9, 1912.
Opinion Filed June 4, 1912.

1. **MUNICIPAL CORPORATIONS: Defective Street: Injury to Pedestrian: Contributory Negligence.** In an action against a city for injuries received by plaintiff while walking along a street, by reason of defects therein, *held* that plaintiff was not chargeable with knowledge of the condition of the street merely because she had formerly lived in the city and, in a general way, knew about the streets, where she testified positively that she did not know of the particular defect that caused her injury.
2. ———: ———: ———: ———. A pedestrian injured by a defect in a street in the night time is not chargeable with contributory negligence on the theory he chose a dangerous way when a safe way was open to him, where he had no knowledge of the defect or that the way he chose was the more dangerous one.
3. ———: ———: ———: ———: **Pleading: Sufficiency of Petition: Variance.** In an action against a city for injuries received by plaintiff while walking along a street, by reason of defects therein, *held* that the petition was sufficient as against a demurrer *ore tenus*; *held, further*, that there was no variance between the *allegata* and *probata*.
4. **APPELLATE PRACTICE: Assignments of Error: Sufficiency.** The appellate court will not review the instructions given, where the appellant, although challenging them, fails to assign any particular error to them or any of them.

5. **MUNICIPAL CORPORATIONS: Defective Street: Injury to Pedestrian: Instruction.** In an action against a city for injuries received by plaintiff while walking along a street, by reason of defects therein, *held* that the instructions given for plaintiff are not subject to criticism.
6. ———: ———: ———: **Sufficiency of Evidence.** In an action against a city for injuries received by plaintiff while walking along a street, by reason of defects therein, *held*, under the evidence, that it was proper to submit the case to the jury.
7. **NEGLIGENCE: Instructions: Submitting Different Degrees of Care: Municipal Corporations.** An instruction, in an action against a city for injuries to a pedestrian on a defective street, that if the pedestrian knew of the existence of the defect, or by ordinary care might have known of it, it was her duty, while traveling on a dark night, to use a great degree of care to avoid the defect, and that if she had exercised due care she would have prevented the accident, then she was not entitled to recover, was properly refused, because contradictory and confusing, as it informed the jury it was plaintiff's duty to exercise two different degrees of care, viz: "great care" and "due care," without defining either term.
8. ———: **Degrees of Care.** "Great care" and "due care" are entirely different matters.
9. **INSTRUCTIONS: Abstract Instructions.** An instruction, though correct as an abstract proposition, is properly refused, if it fails to apply the rules of law it announces to the facts of the case.
10. **MUNICIPAL CORPORATIONS: Defects In Street: Injury to Pedestrian: Contributory Negligence: Instructions.** An instruction, in an action against a city for injuries to a pedestrian on a defective street, that it was the duty of the pedestrian, using the streets at night, to travel only over known and safe streets, and if she voluntarily undertook to use an unknown road, beset with danger, and was injured thereby, there could be no recovery, was properly refused, because omitting any reference to the fact of her knowledge of any danger in the route she selected.
11. **DAMAGES: Personal Injuries: Excessive Recovery.** In an action for personal injuries, where plaintiff sustained a fracture of her right knee cap, resulting in a permanent injury and deformity, a verdict for \$1595 *held* not excessive.

Appeal from Wayne Circuit Court.—*Hon. E. M.
Dearing, Judge.*

AFFIRMED.

Munger & Lindsay for appellant.

(1) The court should have under the pleadings and the evidence sustained defendant's instruction in the nature of demurrer. 1 Thompson on Negligence, secs. 168, 169; 29 Cyc. pp. 526, 527, 528; Meyers v. Glass Co., 129 Mo. App. 556; Sands v. Brewing Co., 131 Mo. App. 413; Coffey v. Carthage, 186 Mo. 585; Wheat v. St. Louis, 179 Mo. 572; Phelps v. Salisbury, 161 Mo. 1; Jackson v. Kansas City, 106 Mo. App. 52; Churchman v. Kansas City, 44 Mo. App. 665; Woodson v. Railroad, 224 Mo. 704. (2) The court having refused the instruction offered by defendant in the nature of a demurrer, the defendant was clearly entitled to its instructions offered, numbers one, two and three. 29 Cyc. p. 526; Carter v. St. Joseph, 126 Mo. App. 629; Huss v. Bakery Co., 210 Mo. 44.

S. R. Durham for respondent.

(1) The verdict is not excessive. Perrette v. Kansas City, 162 Mo. 238; Russell v. Columbia, 74 Mo. 480. (2) In the absence of knowledge of danger a traveler has the right to exercise his own choice of ways. Gerdes v. Christopher, 124 Mo. 347; Stephens v. Macon, 83 Mo. 345; Loewer v. Sedalia, 77 Mo. 446; 28 Cyc. 1429. (3) Variance between the pleading and proof will, in the absence of an exception to a ruling on an objection therefor, be disregarded. Taylor v. Penquite, 35 Mo. App. 389; Covington v. Miles, 82 S. W. 281; Cowan v. Bucksfort, 98 Me. 305; Dano v. Sessions, 65 Vt. 79; Burt v. Gotzian, 102 Fed. 937; Meller v. Railroad, 105 Mo. 455; 2 Cyc. 274 (4), 982b; Sharp v. Railroad, 139 Mo. App. 525. (4) There is no substantial variance between the plaintiff's petition and the proof. As to whether plaintiff was traveling north on West Third street or east on Green street when she

fell into the ditch is immaterial. As to the place and manner of receiving the injury the allegations and proof coincide. Substantial correspondence of proof to allegations is all that is required. Slight variances are immaterial. *Sneed v. Salisbury*, 94 Mo. 426; *Meller v. Railroad*, 105 Mo. 455; *Denver v. Baldasari*, 15 Colo. App. 157; *Rea v. Sioux City*, 127 Iowa 615; *South Omaha v. Taylor*, 4 Neb. 757. (5) There was no error in refusing defendant's instruction in the nature of a demurrer, neither did the court commit error in refusing to give instructions 1, 2, and 3 asked by defendant. They did not correctly state the law. *Coffey v. Carthage*, 162 Mo. 573; *Bentley v. Hat Co.*, 144 Mo. App. 612; *Heberling v. Warrensburg*, 204 Mo. 604; *Gerdes v. Christopher*, 124 Mo. 347; *Loewer v. Sedalia*, 77 Mo. 446; *Chanute v. Higgins*, 70 Pac. 638.

REYNOLDS, P. J.—While plaintiff, in company with her young daughter, was walking along Green street in the city of Piedmont, she was crossing over what she took for a sidewalk on the side of that street where it crosses West Third street. There was an open ditch alongside of Green street, three feet deep and about four feet wide, walled up with stone and cement, the ditch extending to where the one street crosses the other and perhaps beyond. This ditch was open along Green street to Third street and for some distance east and west therefrom. The night was dark and rainy and between 7 and 10 o'clock, while plaintiff was going from the house of a friend, where she had been visiting, to the house of a brother-in-law, at which she was temporarily staying, she fell off of this sidewalk into this ditch with the result that beside sustaining bruises and hurts, she sustained a fracture of the right patella or kneecap. She was picked up and carried to the house of her brother and subsequently several wire stitches were taken in the kneecap. She was afterwards removed to her own home

in Kennett. There she remained under the care of physicians and surgeons for some time after the injury. One of these surgeons testified that there would be some permanent injury to the knee and deformity and that ankylosis had resulted or would result. This surgeon would not undertake to say how long this condition would continue, but said that while it had been treated with good results so far as practicable, plaintiff in all probability would be permanently lame or halting in her walk. He hardly thought she would ever recover the entire free use of the knee.

Alleging the facts connected with her movements on the night of the injury and the condition of the street and sidewalk and that there were no lights of any kind on the streets or at this particular point, and the accident, substantially as above, plaintiff brought her action against the city for \$10,000.

The answer, after a general denial, averred contributory negligence, charging that whatever injuries plaintiff may have received from falling into the ditch, if any, were and are the direct and proximate result of her own negligent and careless conduct in that plaintiff, on the way to her brother's house where she was staying, from that of a friend at whose house she had been visiting, came on to Green street, the principal street of the city of Piedmont, a block west of where the accident occurred and instead of going to her brother's house by the most direct, usually travelled, and safe streets, which said route and streets were fully known to plaintiff, had, in disregard of her duty, negligently, carelessly and recklessly undertaken to go to her brother's house "through the exceeding darkness over a rough, dangerous and untraveled route, and much further in point of distance, and while undertaking to go to her brother's house over this rough, dangerous and untravelled way, she fell off of a bridge into a ditch, resulting in her injuries."

The reply was a general denial of these averments, specifically denying any contributory negligence.

There was evidence tending to show that while plaintiff had lived in Piedmont for a number of years and in a general way knew the streets of that city and had lived not very far from that locality, she had not lived there for the past thirteen years, living for most of that time at Kennett and other places. She testified positively that she was not aware of this bridge or sidewalk across or along this ditch and that on the night in question she undertook to go to her brother's by a short cut which she thought she knew but had not been over the part of it covered by the intersection of these two streets. Starting from the house of her friend at night to go to her brother's, it then being dark and raining, and no street lights, she missed an alleyway that she should have taken as the usual and most accessible route to her brother's and passing that came on to where Third street crosses Green street and started to walk along this and up a hill by a short cut to her brother's house. She testifies that when she struck this crossing—a board one—she supposed that she was on the plank sidewalk of the street and recognizing that to keep on from there to reach her brother's house she would have to climb up a path that led up a hill and through rock, she was afraid to attempt it at night and turned to retrace her steps, still imagining that she was on the sidewalk. As she stepped back to get on to Green street she stepped off this sidewalk, which in point of fact seems to be a bridging over the ditch, and fell into the ditch, thereby sustaining the injuries before set out. She lay there some little time, when her brother and perhaps others came to her assistance and carried her to her brother's house where, as before stated, she remained until taken to her home at Kennett .

The contention of the learned counsel for appellant is, that having two ways, one safe and the other dangerous, if the plaintiff chose the dangerous one she cannot recover for the injuries following. The trouble with this contention is that there is no evidence in the case to show that plaintiff knew of this dangerous place. There were no ordinary street lights of any kind; plaintiff had no lantern; there was no danger sign, red light or warning of any kind at this crossing, nor along this part of the street, no coping or railing of any kind on the sides of this bridge or walk, and it was a dangerous path to one unfamiliar with it. Plaintiff is not to be charged with knowledge of this danger by the mere fact of her residence in the city or her general familiarity with the streets, for she testifies positively, and in this is not contradicted, that she did not know of this particular crossing or of its condition and had gotten on to it by mistake in the darkness. As was held by our Supreme Court in *Buesching v. The St. Louis Gaslight Co.*, 73 Mo. 219, the court, on a demurrer to the evidence, could not infer knowledge of the existence of this dangerous place from the single fact that plaintiff had for several years lived in the vicinity of this crossing. Much less could it be here held, as a matter of law, that because she had formerly lived in Piedmont, it must be inferred that she knew of the dangers of the route she selected, in the face of her positive and uncontradicted testimony that she did not know of it. Nor were there any facts in evidence, apart from that of her previous residence in Piedmont, from which the jury had a right to infer knowledge by plaintiff of this dangerous place.

Complaint is made by learned counsel for appellant that the petition in the case does not state a cause of action or that there is a variance between the averments of the petition and the facts in evidence. We are unable to discover a variance and while, when the testimony was first offered, there was an objection to

the reception of any evidence on the ground that the petition did not state facts sufficient to constitute a cause of action, there was no demurrer to the petition and we are unable to say that the action of the court in overruling this motion was incorrect, or that the petition is so defective that it cannot support the judgment. Although the facts may have been defectively stated, they are stated with sufficient particularity to constitute a cause of action and the variance between the facts alleged and the facts in proof is neither substantial nor material.

Complaint is made of the instructions which the court gave at the instance of plaintiff, all of those instructions being challenged but no particular error assigned to any part of them or to any particular instruction. The absence of such specification of error would throw upon the court the labor of picking out for itself, without guidance or suggestion of counsel, errors in those instructions. We will not undertake that labor. We will say, however, that reading over all these instructions, given at the instance of plaintiff great care is entirely different. Neither was defined as to any particular defect, we find nothing to criticize in them.

At the close of the case, the defendant introducing no evidence whatever, demurred to that offered by plaintiff. As before remarked, to have sustained that would have required the court to infer negligence on the part of plaintiff in the face of positive evidence to the contrary. The demurrer was properly overruled as there was substantial evidence in the case warranting the jury to find as it did both of the facts attendant upon the accident and of the injury. We see no reason to disturb the verdict of the jury on the ground of absence of substantial testimony as to each of these.

Defendant standing on the evidence offered by plaintiff relies upon its plea of contributory negligence.

In line with this, it asked three instructions, all of which the court refused.

The first instruction was to the effect that if the jury found from the evidence that plaintiff knew of the existence of the ditch at the point designated, or by the exercise of ordinary care and diligence on her part might have known the same, then it was her duty while traveling in the night, it being a dark night, to use "a great degree of care and caution to prevent her falling off of said bridge into said ditch," and that if the jury believed from the evidence "that if the plaintiff had exercised due care and caution at the time and place where she fell off of said bridge into said ditch, she could and would have prevented said accident, then and in that event the plaintiff cannot recover and your verdict must be for the defendant." This instruction is contradictory and confusing. It first undertook to tell the jury that it was the duty of plaintiff "to use a great degree of care and caution," without telling them what, under the circumstances, would constitute "a great degree of care and caution." It then undertook to tell the jury that if they thought plaintiff had exercised "due care and caution at the time and place," she could and would have prevented the accident, then she cannot recover. Due care is one thing; great care is entirely different. Neither was defined to the jury by any other instruction. This instruction was properly refused for this reason.

The second instruction undertook to tell the jury that a greater degree of care and caution is required of a person traveling in the nighttime and when in the dark than when traveling in the daytime and when it is light, and that a greater degree of care and caution is required of a person of mature age than is required of a person of immature age. That is all of it. It is a mere generality, not applying the rules of law sought to be laid down to the facts in the case. Such an instruction has been condemned time and again. With-

out discussing the correctness of the legal propositions involved in the instruction as propositions, it was properly refused for the reason stated.

The third instruction undertook to tell the jury that it became the duty of plaintiff in traveling from her friend's house to her brother's, it being very dark, "to travel over known and safe streets and crossings, if she was acquainted with said street, and not to travel over unknown, untraveled and unsafe streets and pass-ways to her point of destination," and that if plaintiff in going from her friend's house to that of her brother disregarded her duty in this behalf, "and voluntarily undertook to go to her brother's house by a farther and unknown route, and one beset with difficulties and danger, and that she was injured thereby, then and in that event, the plaintiff cannot recover and your verdict should be for the defendant." The error in this instruction is that it omits any reference whatever to the fact of plaintiff's knowledge of any danger in the route which she took. That reason alone was sufficient to warrant and even to require the trial court to refuse the instruction.

It is urged that the verdict is so excessive as to indicate passion on the part of the jury. The verdict is for \$1595. Considering the injuries plaintiff sustained, as testified to by her without contradiction, as well as by the undisputed testimony of the attending surgeon, injuries liable to be permanent in their results and to render plaintiff a cripple for life, we see no evidence of passion or prejudice on the part of the jury in awarding plaintiff damages in this amount.

The judgment of the circuit court is affirmed.
Nortoni and Caulfield, JJ., concur.

MONTAGUE COMPRESSED AIR COMPANY, Appellant, v. CITY OF FULTON et al., Respondents.

**St. Louis Court of Appeals. Argued and Submitted May 8, 1912.
Opinion Filed June 4, 1912.**

- 1. CONTRACTS: Prior Negotiations: Evidence.** Where no fraud appears, all negotiations leading up to the making of a contract are merged in the contract.
- 2. APPELLATE PRACTICE: Admission of Evidence: Harmless Error: Instructions.** Error in the admission of evidence of representations by the seller's agent prior to the contract of sale sued on was cured by an instruction given on behalf of the seller that all representations pertaining to the subject-matter of the contract were merged in the contract and only the terms of the contract should be considered in determining the right of recovery.
- 3. ———: ———: Immaterial Evidence: Harmless Error.** The admission of evidence that is merely immaterial does not constitute reversible error.
- 4. ———: Motion for New Trial: Necessity of Specifying Errors.** Rulings on the admission of testimony, not assigned as error in the motion for a new trial, are not reviewable.
- 5. ———: ———: Sufficiency of Assignments of Error: Clerical Errors.** Where the plaintiff is the appellant, an assignment of error in the motion for a new trial, that the court erred in admitting incompetent, irrelevant and immaterial evidence "offered by plaintiff," does not present for review the erroneous admission of evidence offered by defendant, even though the use of the word "plaintiff" was a clerical error.
- 6. SALES: Action for Purchase Price: Evidence: Negative Allegation: Burden of Proof.** In an action for the purchase price of pumping apparatus, bought under a contract warranting the pumps to furnish three hundred gallons of water per minute, "conditioned that the wells will furnish three hundred gallons per minute," the burden was on the plaintiff to prove that the cause of the failure of the pumps to pump the specified amount of water was the insufficiency of water in the wells, under the rule that, although the burden of proof generally rests upon the party holding the affirmative of the issue, yet where the plaintiff grounds his right of action on a negative allegation and the proof of the affirmative is not peculiarly within the

defendant's power, the plaintiff must establish such negative allegation to make out a prima facie case.

7. ———: ———: **Sufficiency of Evidence.** In an action for the purchase price of pumping apparatus, bought under a contract warranting the pumps to furnish three hundred gallons of water per minute, "conditioned that the wells will furnish three hundred gallons per minute," evidence held to authorize a finding that the wells produced the required amount of water.
8. **APPELLATE PRACTICE: Admission of Testimony: Necessity of Objecting.** The admission of testimony is not reviewable where no objection was made to it at the time it was offered.
9. ———: ———: ———: **Timely Objection: Trial Practice.** Where no objection is made to a question propounded to a witness, an objection to an answer which is responsive to the question, on the ground it is a conclusion of the witness, comes too late.
10. **INSTRUCTIONS: Form: Failure to Require that Facts be Found "From the Evidence."** An instruction containing the phrase "that if the jury found the facts," was not erroneous for omitting to add the words "from the evidence," since it was not possible for the jury to fail to understand that all the facts found must be from the evidence.
11. **SALES: Breach of Warranty.** Where a city bought pumps warranted to lift a certain amount of water per minute with the expenditure of a certain amount of power, and the pumps delivered required greater power, causing an increased expense, it was not bound to accept and pay for them.
12. **MUNICIPAL CORPORATIONS: Contracts: Validity.** Under section 2778, Revised Statutes 1909, providing that all contracts by cities shall be in writing, there can be no recovery for labor and material furnished to a city, in the absence of a written contract or memorandum.
13. **APPELLATE PRACTICE: Motion for New Trial: Necessity of Specifying Errors.** Where the giving of certain instructions is complained of in the motion for a new trial, the instructions not thus specified are not reviewable.
14. ———: **Assignments of Error: Sufficiency of Record.** Where the record failed to show what modifications were made in the appellant's requested instructions, an assignment of error based upon such modifications will not be considered.
15. ———: **Motion for New Trial: Necessity of Specifying Errors.** A ground, alleged in the motion for a new trial, that the court erred "in modifying and giving as modified instructions Nos. — asked by plaintiff," is insufficient to preserve any error for review, on appeal.

16. ———: **Refusal of Instructions: Necessity of Excepting.** The refusal of instructions is not reviewable unless an exception is saved thereto.
17. **SALES: Breach of Warranty: Waiver by Acceptance: Estoppel.** A city, which bought pumping apparatus under a warranty that it would do certain work, and which made every possible effort, but without success, in conjunction with the seller's agent, to make it do such work, and, before the filing of suit for the purchase price, had offered to return it to the seller, and held it subject to the latter's order and did not use it as of right or under claim of any kind, was not estopped, by reason of its use of the apparatus, to dispute the seller's claim for payment of the purchase price, nor to deny that it had accepted the apparatus and thereby waived its right to rely upon the warranty.
18. **ESTOPPEL: Pleading.** Estoppel, to be available, must be pleaded.
19. ———: ———. In an action for the purchase price of pumping apparatus, where the answer pleaded a breach of warranty and no reply was filed, the rule that, when a cause is tried on the assumption that a reply is filed, putting in issue the new matter pleaded in the answer, the failure to file a reply may not be urged as error on appeal, is not broad enough to warrant the invocation by plaintiff of an estoppel against defendant to avail itself of the breach of warranty, since estoppel, to be available, must be affirmatively pleaded.

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett*, Judge.

AFFIRMED.

John A. Gilliam for appellant.

(1) The court erred in admitting evidence of alleged representations by plaintiff's agent before contract was made. *Curtiss v. Waterloo*, 38 Iowa, 266; *Singleton v. Fore*, 7 Mo. 515; *Gooch v. Conner*, 8 Mo. 391; *Adams v. Railroad*, 74 Mo. 553; *Crutchfield v. Warrensburg*, 30 Mo. App. 456; *Savage v. Springfield*, 83 Mo. App. 323. (2) The court erred in admitting the evidence of Judge N. D. Thurmond as an expert engineer, his own testimony being that he knew noth-

ing about engineering except what Bryan Obear told him. *Bonnett v. Gladfelt*, 24 Ill. App. 533; *Walton v. Railroad*, 40 Mo. App. 544. (3) The court erred in admitting evidence of Judge Thurmond as to alleged statements of Obear in regard to what the well at the Insane Hospital was doing, that being immaterial and not *res pestae*, but *res inter alios acta*, and it was a collateral issue. *Vale v. Butler*, 111 Mass. 55; *Waugh v. Shunk*, 20 Pa. St. (8 Harris) 130; *Water Co. v. Aurora*, 129 Mo. 540; *Adams v. Railroad*, 74 Mo. 553. (4) The court erred in ruling that the burden was on the plaintiff to show that there was an insufficiency of water in the wells. Defendants were bound to show there was a sufficiency of water. *Windle v. Jordan*, 75 Maine, 149; *Stewart v. Ashley*, 34 Mich. 183; *Blunt v. Barrett*, 124 N. Y. 117; *Heineman v. Heard*, 62 N. Y. 448; *Richardson v. George*, 34 Mo. 104; *Tow Co. v. Ins. Co.*, 52 Mo. 529. (5) The court erred in admitting evidence of alleged misrepresentations of the pump either alleged to be made before the contract as testified by Lovelace, McCall, Thurmond and Wenger, or after the contract as testified to by Thurmond. And in admitting this conclusion which usurped the province of the jury. Q. You may state whether or not the failure to get the fifty gallons in the small well was on account of the deficiency of the water or the deficiency of the pump? A. The deficiency of the pump. Objected to as a conclusion. Objection overruled and exception saved. The admission of this conclusion was reversible error. *Curtiss v. Waterloo*, 38 Iowa, 266; *Singleton v. Fore*, 7 Mo. 515; *Gooch v. Conner*, 8 Mo. 391; 17 Cyc. 27, 28, 45-48; *Walton v. Railroad*, 40 Mo. App. 544; *Musick v. Latrobe*, 184 Pa. St. 375; *Edwards v. Worcester*, 172 Mass. 104; *Ivory v. Deerpark*, 116 New York, 476; *Eubank v. Edina*, 88 Mo. 650; *Benjamin v. Railroad*, 50 Mo. App. 602; *Gavish v. Railroad*, 49 Mo. 274; *Guttridge v. Railroad*, 94 Mo. 468; *King v. Railroad*,

98 Mo. 235; Nash v. Dowling, 93 Mo. App. 156; Koenig v. Railroad, 173 Mo. 698; Dammann v. St. Louis, 152 Mo. 186; Real Estate Co. v. French, 142 S. W. 449. (6) The court erred in giving improper instructions for the defendant. Water Co. v. Aurora, 129 Mo. 540; Devers v. Howard, 88 Mo. App. 253; State ex rel. v. Milling Co., 156 Mo. 620; Smoke Preventer Co. v. St. Louis, 205 Mo. 220; Sedgwick on Damages (6 Ed.), 349; Waterworks Co. v. Joplin, 177 Mo. 496; Depot Co. v. St. Louis, 76 Mo. 393; Morse v. Brackett, 98 Mass. 205; Callanan v. Brown, 31 Iowa, 333; Albers v. Merchants Exchange, 138 Mo. 140. (7) The court erred in sustaining demurrer to plaintiff's second count, and in refusing to set aside non-suit thereon. State ex rel. v. Holladay, 61 Mo. 319; Light & Power Co. v. New York, 62 N. Y. Supp. 726; Dunn v. St. Louis, 7 Mo. App. 592. (8) The court erred in modifying plaintiff's instructions. Water v. Aurora, 129 Mo. 540; Smoke Preventer Co. v. St. Louis, 205 Mo. 220; Depot Co. v. St. Louis, 76 Mo. 393. (9) The court erred in refusing to give instructions asked by plaintiff. Smoke Preventer Co. v. St. Louis, 205 Mo. 220; Water Co. v. Aurora, 129 Mo. 540; Depot Co. v. St. Louis, 76 Mo. 393; 29 Am. & Eng. Ency. Law (2 Ed.), 1095, 1096; Morse v. Brockett, 98 Mass. 205; Mansfield v. Trigg, 113 Mass. 350; Ormond v. Henderson, 77 Miss. 34; 24 Am. & Eng. Ency. Law (2 Ed.), 1079. (10) The court erred in refusing to grant a new trial on the ground that the verdict was against the evidence and against the weight of the evidence and the admission of improper evidence and giving improper instructions. Smoke Preventer Co. v. St. Louis, 205 Mo. 220; Morse v. Brackett, 98 Mass. 205; Baird v. New York, 96 N. Y. 567; Regensburg v. Note-stine, 2 Ind. App. 97; Hardee v. Carter, 94 Ga. 482; Nelson v. Overman, 38 S. W. 882; Gutweiler's Adm'r v. Lackman, 39 Mo. 100; Peck v. Traction Co., 131 Mo. App. 141; Feiertag v. Feiertag, 73 Mich. 302;

Sinker v. Diggins, 76 Mich. 561; Maxted v. Fowler, 94 Mich. 112; People v. Abbott, 97 Mich. 487; Colby v. Portman, 115 Mich. 95; Juergens v. Thom, 39 Minn. 458; Railroad v. Butler, 57 Pa. St. (7 P. F. Smith) 335; Wing v. Chapman, 49 Vt. 36; Bradley v. Cramer, 66 Wis. 298; Sumamon v. Moore, 142 S. W. 494-497. (11) The sale was on trial and the contract was entire, and the failure to object within thirty days after installation on November 27, 1907, was an acceptance which waived all conditions and the fact that the defendant continued to use the compressor till the day of trial and thereafter to the present time, and used the small pump till after suit brought, and by their carelessness broke the large pump and failed to pay for its repair, each and all of said acts amount to an estoppel to dispute plaintiff's claim, and a waiver of every condition, and this court should reverse the case and direct entry of judgment for the plaintiff. Water Co. v. Aurora, 129 Mo. 540; Benjamin on Sales, (7 Ed.), sec. 595; Smoke Preventer Co. v. St. Louis, 205 Mo. 220; 29 Am. & Eng. Ency. Law (2 Ed.), 1095, 1096, and notes; 24 Am. & Eng. Ency. Law (2 Ed.), 1079; Morse v. Brackett, 98 Mass. 205; Mansfield v. Trigg, 113 Mass. 350; Ormond v. Henderson, 77 Miss. 34; Nelson v. Overman, 38 S. W. 882; 19 Ky. Law Rep. 161; Johnson v. McLane, 7 Blackford (Ind.) 501; Leppel & Co. v. Pratt, 126 Mich. 453; Hagadorn v. McNair, 96 N. Y. Supp. 417

J. R. Baker for respondent.

(1) The circumstances under which a contract was made and the object in view should always be considered in giving meaning to the terms thereof. And in the interpretation of the contract, it is a recognized rule that you should seek out the construction the parties thereto placed upon it and apply that construction. Tetley v. McElmurry, 201 Mo. 382; Nardyke

& Marmon Co. v. Kehlor, 155 Mo. 643. (2) The court did not err in holding that the burden was on plaintiff to show there was an insufficiency of water in the well. Marshall v. Ferguson, 94 Mo. App. 175; Wolf v. Railroad, 155 Mo. App. 125; 16 Cyc., 927. (3) The evidence shows that the interpretation given by the parties to this clause was that plaintiff would pump 250 gallons of water from the large well and fifty gallons per minute from the small well. And the rule is that where a clause or phrase is ambiguous the court will sustain the interpretation of that clause given to it by the parties themselves when the contract is made. Eaton v. Coal Co., 125 Mo. App. 194; Bader v. Mill Co., 134 Mo. App. 135; Woolen Co. v. Wollman, 87 Mo. App. 659. (4) There was no evidence of any written contract between plaintiff and defendant, or written memorandum of any kind, covering items set out in the second count. This being true, the demurrer was properly sustained. R. S. 1909, sec. 2778; Savage v. City, 83 Mo. App. 323; Perkins v. School Dist., 99 Mo. App. 483. (5) It is axiomatic that a party must show complete performance on his part of his contract before he can recover upon it. Myer v. Christopher, 176 Mo. 580.

REYNOLDS, P. J.—This is an action, the petition in which contains three counts.

The first count alleges a contract between plaintiff and defendant city, the plaintiff a manufacturing corporation, one of the defendants the city of Fulton, a city of this state, the others certain of its officers. For brevity we will hereafter refer to the defendants in the singular, intending by that the city. The contract is in the form of a proposal from plaintiff, accepted by defendant city, and all in writing, under which plaintiff proposed to furnish to the city "two Obear Air Lift Displacement Pumps of the aggregate

guaranteed capacity of 300 gallons of water per minute when lifting water from a nine inch and six inch cross sectional diameter wells any height with eighty pounds air pressure, conditioned of course that the wells will furnish 300 gallons of water per minute." Plaintiff was also to furnish an air compressor of specified size and make, "all for the sum of \$2900 f. o. b. cars Fulton, Missouri. Payment to be made to us thirty days after installation and operation of the compressor and pumps and determined to be satisfactory." This is followed by specifications in detail as to the capacity of the proposed plant and for the purposes of this case unnecessary to be here set out. The first count prays for judgment for this amount with interest from December 31, 1907, and for costs.

The second count charges that after the installation and acceptance of the pumps and air compressor plaintiff, for the purpose of reinstalling the pumps at a lower working point in the well, at the instance and request and understanding with defendant, selected, ordered and caused to be shipped to defendant the necessary mechanism and materials for installation of the pumps at a cost of \$643.40. Itemizing this account, plaintiff asks judgment for that amount.

There is a further count in the petition, setting up an equitable cause of action, which it is unnecessary to notice as it was disregarded at the trial and no error is assigned upon it one way or the other.

The answer, admitting the execution of the contract set out in the petition for the installation of the pumping plant, avers that that was the only contract entered into between the city and plaintiff; admits that under that contract plaintiff proceeded to install the pumping machinery; that by the terms of it plaintiff obligated itself that the plant would pump 300 gallons of water per minute when both pumps were operated at the same time and when the lift of the water would not exceed 500 feet, but denies that plaintiff

carried out and performed its contract according to its provisions and denies that the installation of the pumping machinery was made and the operation of the compressor and pumps was satisfactorily determined on the 27th of November, 1907, or at any other time; denies that they were ever accepted or that on December 31, 1907, plaintiff presented its bill to the city and demanded payment thereof in any sum. To the contrary, defendant avers that after the pumping plant had been installed in November and the pumps failed to give and furnish 300 gallons of water per minute but furnished not more than 125 gallons of water per minute, the agent of plaintiff claimed that the pumps were not deep enough and had them lowered and they again failed to give an increase in the amount of water furnished; that they were operated for a considerable time under the direction of plaintiff's agent and failed to produce more than 125 gallons of water per minute; that plaintiff failed to operate both pumps at the same time and when they were both operated at the same time the two pumps gave no more water than when the larger of the two pumps was worked alone; that the pumps continued to be used from the time of the installation until sometime in March following, they being operated at the direction of plaintiff's agent, and that neither plaintiff nor its agent ever reported to the officers of the city that plaintiff was ready to make a test nor did he request during that whole time that the test be made of the pumps, but on the contrary the agent knew that at no time had the pumps given the amount of water required by the contract; that at the request of plaintiff's agent the pumps were removed so that agent could examine the valves; that in the attempt to remove the pipes under the direction of this agent of plaintiff, the piping and pumps broke away from the tackle and fell about 700 feet into the well; that at great expense defendant had the piping removed and the well

cleared out and made 420 feet deeper and notified plaintiff that the well was ready for replacing of the pump according to the contract and plaintiff refused to replace it. Setting up the representations alleged to have been made by plaintiff's agent prior to entering into the contract and a failure of these representations, the answer to this first count alleges nonperformance of the conditions of the contract. Averring that after the well was cleared of the pipe and deepened, the well "at all times both before and after it was deepened furnished a sufficient quantity of water and at all times the said pump had a greater submergence than the plaintiff required, and that by reason of the facts herein pleaded as defense to the first count of the petition the defendant, the city of Fulton, owes the plaintiff nothing on said contract, and prays judgment against the plaintiff on said first count of the petition."

The answer to the second count denies generally the averments of that count, and after a more specific denial of the correctness of the items in this count, pleads that the city, by a resolution duly adopted by its council, offered to pay plaintiff the sum of \$295 to cover the repair of the pump on condition that plaintiff would replace the destroyed pumps and make the pumps work when operated together and at the same time according to the terms of the contract, it being provided in the resolution to this effect that nothing in it was intended to change or alter the terms and provisions of the original contract. It is also averred that plaintiff refused this, wherefore it is claimed that defendant is not liable.

A counterclaim is also interposed by another count in the answer, the city claiming \$3681.62 by way of expenditures made and damage to the city for breach of contract by plaintiff.

It appears by the recitals of the abstract of the record proper that after a hearing of the evidence of

plaintiff, defendant demurred to the second count of the petition and the court sustained it, whereupon plaintiff took a nonsuit as to this second count with leave to move to set it aside, afterwards filing this motion and saving exception on its being overruled. At the close of defendant's testimony defendant took a nonsuit on the counterclaim with leave to move to set that aside, but no further action on this appears.

The jury returned a verdict on the first count of plaintiff's petition in favor of defendant; judgment followed and plaintiff filed a motion for new trial, one in arrest of judgment and one to set aside the nonsuit on the second count of the petition. The only motion for new trial before us and as set out in the abstract as having been filed by plaintiff, after assigning that the verdict is against the evidence and the weight thereof and against the law as applied to the evidence and against the law as set out in the instructions given by the court, reads as follows:

"3. That the court erred in admitting incompetent, irrelevant and immaterial (evidence?), offered by plaintiff.

"4. That the court erred in excluding competent, relevant and material evidence offered by this plaintiff.

"5. That the court erred by giving instructions Nos. 7, 4, 9, requested by defendant.

"6. That the court erred in declining to give instructions Nos. 2, 3 and 5 requested by this plaintiff.

"7. That the court erred in giving instructions Nos. — of its own motion, and in modifying and giving as modified instructions Nos. —, asked by plaintiff.

"8. That the court erred in admitting testimony offered by defendant as to statements and representations of the parties to the contract sued upon, prior to the execution of said contract.

“9. That the court erred in sustaining defendant’s demurrer to the second count of plaintiff’s petition.”

This motion being overruled plaintiff duly excepted. It also filed a motion in arrest of judgment, which was overruled, but no error is here assigned on that.

We will dispose of this case by taking up the points assigned for error by learned counsel who appeared before us for appellant, of whom it is no more than fair to say that he appeared in the case after it had been appealed to this court, not having previously participated in its conduct.

The first point is that the court erred in admitting evidence of alleged representations by plaintiff’s agent before the contract was made. This point is well saved by the eighth error assigned in the motion for a new trial. Counsel cites a number of cases in support of the proposition that all prior negotiations, no fraud being alleged or appearing, are merged in the contract. There is no doubt of the correctness of this. But it disappears from this case on consideration of the instruction which the court gave to the jury at the instance of plaintiff at the conclusion of the trial. That instruction, number 4, is to the effect that the law deems all statements or representations of the parties to a written contract pertaining to the subject-matter of the contract, made prior to the execution thereof, as merged or embodied in the contract, “hence in determining whether or not plaintiff is entitled to recover in this suit, you have to determine only whether or not plaintiff complied with the terms of said contract as set out in other instructions.” We hold that this instruction was sufficient to cure whatever error was embodied in admitting the testimony of witnesses as to the preliminary negotiations and understandings of the parties prior to the making of the contract. [Anderson v. Union Terminal R.

Co., 161 Mo. 411, l. c. 420, 61 S. W. 874; Harrison v. Kansas City Electric Light Co., 195 Mo. 606, l. c. 634 *et seq.*, 93 S. W. 951.]

There are cases in which the evil wrought by the admission of improper testimony cannot be said to be cured by its subsequent withdrawal but we do not think that that was the situation in the case at bar.

The second and third points go to alleged error in the admission of evidence offered by the defendant, particularly to certain evidence given by Judge N. D. THURMOND, which is claimed to have been evidence that an expert alone could give, it being correctly stated that Judge THURMOND in his own testimony had admitted that he knew nothing about engineering except what had been told him by plaintiff's agent. They also go to evidence given by him as to what the plaintiff's agent had told him about the operation of a like pump in some asylum for the insane. A very careful examination of the testimony of Judge THURMOND fails to show that when examined as a witness by defendant, he gave any testimony that might be considered expert testimony. All he gave that we can construe as expert evidence was given under cross-examination by counsel for plaintiff and this not arising out of his direct examination. As to his evidence as to the alleged statements of an agent of plaintiff in regard to what a well at the insane hospital was doing, it is argued that that was immaterial and not *res gestae* but *res inter alios acta* and a collateral issue. This objection, in the main answers itself—being merely immaterial, its admission would not constitute reversible error. But all inquiry by us into the correctness of the ruling of the trial court upon the admission of testimony offered and introduced by defendant, save as to the admission of evidence of transactions prior to making the contract, is closed by failure of plaintiff to assign this as error in the motion for a new trial. But apart from the evidence as to

understandings prior to making the contract, the admission of no other offered by defendant and admitted is challenged. Outside of the eighth assignment, the only assignments of error in the admission of testimony are the third and fourth. The third even is of doubtful import. As printed in the abstract and as we have reproduced it, it reads: "That the court erred in admitting incompetent, irrelevant and immaterial (evidence?), offered by plaintiff." Presumably the word "evidence" is not in the motion, for counsel have inserted it in parenthesis, followed by an interrogation mark, and we read this assignment in the motion as if the word "evidence" was there. But it distinctly complains of admission of incompetent, irrelevant and immaterial—"offered by *plaintiff*." Possibly a clerical error in using the word plaintiff but we are powerless to disregard it. The fourth ground assigned in the motion for a new trial is to the exclusion of competent, etc., evidence "offered by this *plaintiff*." Our attention is called to no evidence offered by plaintiff and excluded.

The fourth point is that the court erred in ruling that the burden was on plaintiff to show that there was an insufficiency of water in the wells, it being claimed that defendant was bound to show there was a sufficiency of water. We cannot agree that this assignment is sustainable. The contract itself contains this provision, after a proposal upon the part of plaintiff to furnish the pumps, namely, "conditioned of course that the wells will furnish 300 gallons of water per minute." In the course of the trial this occurred, the contracting agent of plaintiff being under examination as a witness in its behalf: Plaintiff offered to show by this witness the capacity of the pump. Objection was made, on what ground is not stated. Whereupon the court observed: "I understand that contract to mean that the party furnishing the pump would furnish a pump that would actually pump three

hundred gallons of water a minute, providing, of course, the water was there to be pumped." Whereupon Mr. Hay, of counsel for plaintiff, said: "May I ask what the court's theory is on ruling on this objection, that the theory of the court is that the burden is on the plaintiff to show if there was a failure to pump three hundred gallons of water a minute that it was due to the shortage of water supplied?" To which the court answered, "Yes, sir; that's the construction I put on that contract." No objection whatever was interposed, no exception of any kind saved at the time. A careful reading of the instruction given fails to show any instruction by the court which distinctly announces where the burthen of proof was on this matter. The instruction that comes nearest to doing that is the seventh, given for defendant, to the effect that the court instructs the jury that under the contract between plaintiff and defendant, "it was plaintiff's duty to pump 300 gallons of water per minute or to demonstrate that the wells were not yielding 300 gallons of water per minute; and if from all the evidence you believe plaintiff failed to do this then it did not comply with the contract between it and the city, and you will find for the defendant unless you further find from the evidence that plaintiff was prevented from complying with the contract by a failure on the part of the defendant to comply with the said contract on its part." It is difficult to say that this threw the burthen of proof on plaintiff as to the quantity of water flowing in the wells. However that may be, and although in the answer defendant had averred that the well did flow 300 gallons of water per minute, we are of the opinion that the affirmative of this was on plaintiff. That is to say, the burthen of the negation of sufficient water was on plaintiff, as in point of fact its whole claim was that the pumps furnished were of right capacity but that the water which came into the well was not of the required quantity.

On the authority of the decisions of our court in *Marshall v. Ferguson*, 94 Mo. App. 175, l. c. 181, 67 S. W. 935, and in *Wolf v. United Rys. Co.*, 155 Mo. App. 125, l. c. 123, 133 S. W. 1172, we hold that while as a general proposition the burthen of proof rests on the party holding the affirmative issue, where the plaintiff grounds his right of action on a negative allegation and the proof of the affirmative is not peculiarly within the defendant's power, then the plaintiff must establish this negative to make out a *prima facie* case. We hold therefore, that even passing over the very doubtful question as to whether this ruling of the court has been properly saved by exception so that we can review it, that there was no error in the theory upon which the trial court proceeded in the admission of testimony and in the instruction to the jury. A careful examination of the testimony in the case warrants us in holding that there was strong affirmative evidence which warranted the jury in finding that the flow of water was ample.

The fifth point is that the court erred in admitting evidence of alleged misrepresentations of the pump, either alleged to have been made before the contract or after the contract, and particularly to the question made of witness Wenger and his answer, the question being: "Do you think it was on account of the flow of water that the pump didn't pump as great as at the start, or was it on account of the pump? A. It was on account of the pump misrepresentation." This witness was also asked to state whether or not the failure to get the 50 gallons in the small well was on account of the deficiency of water or the deficiency of the pump. To this the witness answered, "The deficiency of the pump." As to the admission of the evidence of the representations made before entering into the contract, we have disposed of that in consideration of the first point made by learned counsel for appellant. We cannot sustain the further assignment

for other reasons. There was no objection whatever made or saved to the first question and answer above noted so that that is out of the case. When the second question was asked, no objection was made to it but the objection was to the answer as a conclusion. Counsel are not allowed to wait and take the chance of a witness answering favorably and when the answer turns out to be unfavorable then for the first time raise an objection to the question and answer. That comes too late. Over and above these reasons, this evidence offered by the defendant and as we have seen, its admission, is not challenged in and by the motion for a new trial.

The sixth point made by the learned counsel for appellant is that the court erred in giving improper instructions for defendant. The only instructions on which error is assigned in the motion for new trial are plaintiff's instructions numbered 7, 4 and 9, and these are the only ones open to our consideration. Instruction No. 7 is the one which we have before referred to, which told the jury that it was plaintiff's duty to pump 300 gallons of water per minute or to demonstrate that the wells were not yielding 300 gallons of water per minute, and if from all the evidence they believed plaintiff failed to do this, it did not comply with the contract. As we have before stated, so far as this instruction can be construed to throw the burthen of proof of sufficiency of flow of water in the well on plaintiff, we think it correct. As to the remaining part of it, that it was defendant's duty to pump 300 gallons of water per minute, there is no question whatever of the correctness of this, as that is precisely what is provided for in the contract.

Without setting out the fourth and ninth instructions in full, it is sufficient to say of them that they cover the contract correctly as to the requirements of plaintiff in regard to furnishing force and proper setting of the pumps and as to the work they were ex-

pected to do under the contract. One of the principal arguments against these instructions is that they fail to tell the jury that they are to find these facts "from the evidence," and that there is no evidence supporting them. This is particularly assigned to the fourth instruction. It is hardly to be supposed that men selected as qualified to sit as jurors in a case would for a moment suppose that when the court instructed them as to the facts necessary to find a verdict one way or the other and that when the court spoke of the facts in the case, the jurors did not clearly understand that the court was speaking of facts as before them in evidence. No body of intelligent men, selected as jurors, could possibly have misunderstood the fourth instruction as directing the attention of the jury to the terms of the contract and as to the facts relating to the performance or nonperformance of it, other than as disclosed by the evidence. The mere omission of the court to say to the jury in so many words that if they found "from the evidence" in the case so and so, did not make the instruction fatally defective. Moreover this fourth instruction distinctly told the jury that if they believed the agent of plaintiff had placed his pump low enough to lift water 500 feet the well would have supplied 300 gallons of water per minute, then the jury are instructed that plaintiff did not comply with the terms of his contract and cannot recover in this action provided they found that plaintiff was requested by defendant to place the pump at such a level in the well as to enable it to lift 500 feet high, and that the failure to do so was not caused by the neglect or refusal of the city to furnish pipe or other material for use in placing said pump at a proper depth for that purpose. This instruction certainly was more favorable to the plaintiff than to the defendant although given at the request of defendant.

The error assigned to the ninth instruction is that the court by that told the jury that without con-

sidering the efficiency of the appliances, their acceptance, their retention and use, that if it took greater air power and was more costly to defendant to operate, they should find a verdict for defendant. We do not think this ninth instruction is subject to this criticism. It sets out, following the contract, that for a 400-foot lift, plaintiff guaranteed "2.6 cubic feet of free air per gallon of water at eighty pounds maximum air pressure to start the pump, and sixty-five pounds constant working pressure; and that for a 500-foot lift we guarantee three cubic feet of free air per gallon of water at eighty pounds maximum air pressure to start the pump and sixty-five pounds constant working pressure to lift water 500 feet high and discharging 300 gallons of water per minute." These parts of the instruction are word for word as in the contract. Setting them out the court then instructed the jury that if from the testimony they believed that the pumps, when installed in the well, required greater air power to operate them than that specified in the contract and if the jury further found that the greater air power which it required was more costly to defendant than the air power which was mentioned in the contract, then they were instructed to return a verdict for defendant. We are unable to see any error in this. It seems to follow as a natural consequence that if the appliance that plaintiff contracted to furnish defendant was so different from that actually furnished as to involve the expenditure of more money than was contemplated to operate it, then it was not the kind of appliance contemplated by the parties and defendant was not bound to accept it or to retain it and pay for it.

The seventh point is that the court erred in sustaining the demurrer to plaintiff's second count and in refusing to set aside the nonsuit thereon. This demurrer was sustained to the second count and the

evidence introduced under it on the ground that there was no evidence showing that the work done and material charged for under this second count was evidenced by any written contract or written memorandum of any kind between the parties covering the items set out in the account. Section 2778 of the Revised Statutes 1909, distinctly provides the method by which cities may contract, it being provided, among other things, that the contract shall be in writing, and it has been held that a contract made by an agent of a city not in accordance with the statute is void *ab initio* and cannot be ratified. [See *Savage v. City of Springfield*, 83 Mo. App. 323; *Perkins v. Independent School Dist. of Ridgesay*, 99 Mo. App. 483, 74 S. W. 122.].

In his argument in this case learned counsel for appellant assigns error on a number of other instructions given for defendant but these are the only ones specified in the motion for new trial and we cannot go outside of that to examine or test the correctness of instructions.

The eighth point is to the error of the court in modifying plaintiff's instructions. We are unable to determine from the abstract before us the modifications made by the court in plaintiff's instructions, so that we are bound to disregard this assignment. We might dispose of this point also on the other proposition that in the motion for new trial the only assignment covering this is the seventh, which we have given before but to repeat is as follows: "The court erred in giving instructions Nos. — of its own motion, and in modifying and giving as modified instructions Nos. — asked by plaintiff." It does not appear that the court gave any of its own motion, and we are unable to determine what modifications the court made in any instructions, as before remarked.

The ninth point urged by counsel for appellant is that the court erred in refusing to give instructions

asked by plaintiff. Referring to the motion for new trial, the error assigned is to the failure to give instructions numbers 2, 3 and 5, requested by plaintiff. Turning to the abstract of the record we find instructions numbers 2, 3 and 5, tendered by plaintiff and marked as refused, but we find no exception whatever in the abstract to the refusal of these instructions. They are therefore closed to us for examination or comment.

Passing for the present the tenth point and taking up the eleventh point, it is urged that the sale was on trial and the contract was entire, and that the failure to object within thirty days after installation on November 27, 1907, was an acceptance which waived all conditions, and the fact that defendant continued to use the compressor until the day of the trial and thereafter to the present time and used the small pump until after suit was brought and by its carelessness broke the large pump and failed to pay for its repair, amounted to an estoppel to dispute plaintiff's claim and a waiver of any condition, and it is urged that the court should reverse the cause and direct entry of judgment for plaintiff.

We might dispose of this by saying that an estoppel, to be available, must be pleaded, and none was pleaded. In fact, we have nothing in the abstract of the record to show that a reply of any kind was filed. While it is true that when a cause is tried on the assumption that a reply has been filed taking issue on any new matter in the answer, it is too late to urge the failure to reply in the appellate court. Indeed no such point is here made by counsel for respondent. But that rule is not broad enough to excuse the failure to plead estoppel.

Waiving this, a careful examination and consideration of the testimony in the case fails to show any acceptance and waiver whatever, which constitute an estoppel. In point of fact, from the very first installa-

tion or attempted installation of the plant, the officers of defendant corporation appear to have been making every possible effort, but without success, in conjunction with plaintiff's agent, to make these pumps do the work which had been contracted. It is true that the defendant city retains and seems to have been operating the compressor and possibly the smaller pump, but it is in evidence that it had offered to return the compressor and the smaller pump long before the institution of this suit and had placed them and still holds them at the order of plaintiff and have in no manner used them as of right or claim of any kind. This assignment is untenable.

The remaining point is numbered ten and is based upon the refusal of the trial court to grant a new trial on the ground that the verdict is against the evidence and against the weight of the evidence and on account of the admission of improper evidence and the giving of improper instructions. We have disposed of the questions arising over the admission of the evidence and over the giving of instructions. Reading over this whole record we see no reason whatever to challenge the verdict of the jury as not being sustained by ample testimony. In fact we are so much impressed with the testimony introduced at the trial as to the complete failure of the plant to do the work required that we do not see how any jury could have arrived at a different conclusion. We will not disturb that verdict.

The judgment of the circuit court is affirmed.
Nortoni and Caulfield, JJ., concur.

MARY PRENDERGAST, Respondent, v. CHARLES
GRAVERMAN, Appellant.

St. Louis Court of Appeals. Argued and Submitted May 8, 1912.
Opinion Filed June 4, 1912.

1. **APPELLATE PRACTICE: Abstract: Opinion of Trial Court.** The written opinion of the trial court, trying a case without a jury, cannot be noticed on appeal, when not set out in the abstract of the record.
2. **UNLAWFUL DETAINER: Right of Action: Parties: Landlord and Tenant.** Where an owner leases his premises, and the lessee, at the time of an entry and detainer by a third person, is in possession under the lease, the right of action for unlawful detainer accrues to him and not to the owner.
3. **APPELLATE PRACTICE: Conclusiveness of Finding.** A finding, on conflicting testimony of witnesses before the court, trying the case without the jury, is conclusive on appeal.
4. **UNLAWFUL DETAINER: Right of Action: Possession.** A plaintiff, to maintain unlawful detainer, under section 7657, Revised Statutes 1909, need not actually be on the land, or keep servants there, but any act done by him on the premises, indicating an intention to hold the possession thereof to himself, is sufficient to give him actual possession and to warrant the maintenance of the action by him.
5. ———: **Right of Action: Parties: Landlord and Tenant.** Where a lessee abandons the premises, the right of possession reverts to the owner, who must be considered in possession, although not personally present, so as to give him a right of action for unlawful detainer, under section 7657, Revised Statutes 1909, against a third person.
6. ———: **Issues: Evidence.** An action for unlawful detainer must be determined on the relative rights of possession between the parties, and the question of title is immaterial.

Appeal from St. Louis County Circuit Court.—*Hon.*
G. A. Wurdeman, Judge.

AFFIRMED.

Wm. F. Broadhead for appellant.

(1) To maintain this action, it was necessary for the complainant to prove that at the time of the alleged entry and disseizin by defendant, she was in the actual, visible, open, exclusive, peaceful and bona fide possession of the premises claimed, and this she has not done; the evidence does not even tend to show such possession. *Armstrong v. Hendricks*, 67 Mo. 542; *Keen v. Schweigler*, 70 Mo. App. 409; *McCartney v. Alderson*, 45 Mo. 35, 49 Mo. 450; *DeGraw v. Prior*, 60 Mo. 56; *Dyer v. Reitz*, 14 Mo. App. 45; *Spalding v. Mayhall*, 27 Mo. 379; *Collier v. Green*, 83 Mo. App. 166; *Milem v. Freeman*, 136 Mo. App. 106; *Underwood v. Caruthersville*, 146 Mo. App. 294; *Anderson v. Railroad*, 128 Mo. App. 382; *Ford v. Fellows*, 34 Mo. App. 630; *School District v. Holmes*, 53 Mo. App. 487; *Buck v. Endicott*, 103 Mo. App. 248.

(2) If there was any evidence tending to show possession of said premises in anyone, other than the defendant's landlord, it was in John Brennan, complainant's tenant, whose term had not expired or been surrendered, and she cannot maintain this action for an invasion of the possession of her tenant. *Reed v. Bell*, 26 Mo. 218; *Burns v. Patrick*, 27 Mo. 434; *Bell v. Cowan*, 34 Mo. 251; *McCartney v. Alderson*, 45 Mo. 35, 49 Mo. 456; *Hyde v. Fraher*, 25 Mo. App. 414; *Krevet v. Meyer*, 24 Mo. 107; *Collier v. Green*, 83 Mo. App. 166; *Holzhausen v. Hoskins*, 115 Mo. App. 267; *Adams v. Bonnefon*, 124 Mo. App. 457.

(3) The length of time defendant's landlord had claimed the disputed premises, was competent and material as a foundation for proof of acts of possession, pursuant to such claim, of which this defendant had a right to avail himself, in order to rebut complainant's case, and to show the good faith of his own, and of his landlord's claim, from whom it was derived; hence the court erred in sustaining complainant's objection to

Vogelsmeier, testifying as to how long he had claimed the premises, especially as such objection was made without stating any grounds therefor. *Buck v. Endicott*, 103 Mo. App. 248; *Milem v. Freeman*, 136 Mo. App. 106. (4) There was a lack of substantial evidence to support the finding of the lower court, and this court may reverse it for that reason. *Milem v. Freeman*, 136 Mo. App. 117; *Buck v. Endicott*, 103 Mo. App. 248.

R. H. Stevens for respondent.

(1) When a tenant leaves either at the end of his term or on surrender of lease, the landlord comes into possession, though not personally present. *Frank v. Nichols*, 6 Mo. App. 72. (2) Any overt act indicating dominion and a purpose to occupy, and not to abandon the premises, will satisfy the requirement. *Willis v. Stevens*, 24 Mo. App. 496. (3) In order to constitute such a possession as will sustain an action of forcible entry and detainer, it is not necessary that the party should stand on the land, to keep a servant or agents there; but any act done by himself on the premises, indicating an intention to hold the possession thereof to himself will be sufficient to give him the actual possession. *Bartlett v. Draper*, 23 Mo. 407. (4) Where a tenant leased at the end of his term or by surrender of his lease, the landlord comes into the sole possession and must be considered possessed of the premises although not personally present. *May v. Lockett*, 48 Mo. App. 472.

REYNOLDS, P. J.—This is an action for unlawful detainer of nine and a fraction acres of land in St. Louis county, the action brought under section 3321, Revised Statutes 1899, now section 7657, Revised Statutes 1909. The cause was tried before the court, a jury having been waived, and at the conclu-

sion of the testimony defendant asked four declarations of law. First, that for plaintiff to recover in this action, she must show that she was in the actual, peaceable, visible, open and exclusive possession of the land described in the complaint at the time of the alleged unlawful entry by defendant and that defendant then unlawfully entered upon and disseized her of the land. Second, that the possession necessary to be shown by plaintiff is a real, exclusive, visible, actual, *bona fide* possession and not a mere scrambling possession taken for the purpose of compelling the opposing party to institute a suit to determine the title or right to possession of the land in dispute and unless the court is satisfied from the evidence that plaintiff was in the real, exclusive, visible, actual and *bona fide* possession of the land at the time of the alleged unlawful entry complained of, then the finding and judgment must be in favor of defendant. Third, that if the court sitting as a jury found from the evidence that at the time of the alleged unlawful entry on the land described in the complaint, one John Brennan, as a tenant of plaintiff, was in possession of the land, she cannot recover. Before offering these declarations of law defendant asked for a declaration that under the pleadings and evidence plaintiff could not recover and the finding and judgment must be in favor of defendant. The court refused this, defendant duly saving exception. Plaintiff asked no declarations of law and none were given by the court of its own motion.

In the brief of counsel for appellant it is stated that the court filed a written opinion in the case from which counsel quotes. No such written opinion is in the abstract of the record and it is not before us in such shape that we can notice it. The court rendered judgment in favor of plaintiff and against defendant, and finding defendant guilty as charged in the complaint and assessing the damages at one cent and the

value of the monthly rents and profits at one cent, ordered restitution of possession and judgment for double damages and for costs. Filing a motion for new trial and excepting to that being overruled, defendant has duly perfected his appeal to this court.

At the trial of the cause each of the parties introduced plats of surveys that had been made by different surveyors and the witnesses in testifying frequently referred to these plats, but the reference to them is so much by pointing out places on them that it is very difficult to follow the testimony as to the different locations concerning which the witnesses were testifying. That, however, is not so material as we think we have been able to gather an intelligible idea of the general trend of the testimony. Two sons-in-law of plaintiff and her late husband, a Mr. Brennan and a Mr. Pearia, had been tenants of Mr. Prendergast during his lifetime and of his wife after his death, occupying and cultivating various portions of a large tract which plaintiff claimed, Brennan in possession of and cultivating the nine and a fraction acres involved in this action. The evidence tends to show that his tenancy terminated sometime in the year 1906, or that he had then abandoned possession, and that about the time alleged in that complaint, that is about March 1, 1907, he and Pearia going upon the land found defendant in possession of it. They told him that the land he was occupying was "our" land, evidently referring to it as belonging to the family, as neither of them claimed as tenants or as owners at that time. They started to fill out breaks in a wire that it appears had been around the land, or a part of it, with the intention of inclosing the whole or a part of the fractional nine-acre tract. Defendant told them that he was placed in possession of it by a Mr. Vogelsmeier and that Vogelsmeier claimed that that was his land, and he warned them not to attempt to disturb him or to put up the wire around the land. Not desiring trou-

ble, as one of these men testified, they abandoned their effort to stretch the wire around the tract and to put it up where it had been taken down. Defendant at the time was plowing the land.

It was in evidence that before the institution of the suit, plaintiff, on May 23, 1907, had caused notice to be served on defendant to deliver possession to her of the land described in the complaint within ten days from that day. Defendant paying no attention to the notice, this action was afterwards commenced, the statutory affidavit being made by Brennan as agent for plaintiff.

The point of controversy over the evidence is as to whether plaintiff herself was in possession of the land or whether Brennan at the time was the lessee and as such entitled to possession and consequently the party who should have brought this action.

The court distinctly declared as a matter of law by the third declaration given, that if he found from the evidence that plaintiff had leased the premises to Brennan and that Brennan at the time of the supposed entry and detainer by defendant was the tenant of plaintiff under a lease of the premises, then the right of action accrued to the tenant and not to the landlord. This is practically the instruction that was asked and refused in *Bell v. Cowan*, 34 Mo. 251, l. c. 253, and for refusal of which, along with other instructions asked, the judgment in that case was reversed. It is clear that as to this proposition the learned trial court stated the correct rule of law. Hence to find for plaintiff, as he did, he must have found as a fact that Brennan was not her tenant, but that the right of possession was in plaintiff. Necessarily learned counsel for appellant contends that after giving this correct declaration of law, the conclusion of the court on the facts there referred to should have been for defendant. It must be confessed that the evidence is very uncertain as to this particular point, which is the vital point in

the case, but as the witnesses were before the learned trial court and he heard all the testimony and had the plats of the surveys before him, we are bound by his finding on the facts.

At an early day it was laid down by our Supreme Court in *Bartlett v. Draper*, 23 Mo. 407, a case that in many of its features fits the case at bar, passing on an instruction asked by plaintiff in that case and given by the court (l. c. 409), that "in order to constitute possession in plaintiff, it is not necessary that he should stand on the land, or keep servants or agents there; but any act done by himself on the premises indicating an intention to hold the possession thereof to himself, will be sufficient to give him the actual possession." Here Brennan and Pearia, evidently acting for plaintiff, warned defendant off of this land, attempted to exercise acts of dominion over it for plaintiff and were prevented by defendant.

When Brennan, as lessee of this tract in controversy, abandoned the premises, as there is evidence tending to show he did, the right of possession reverted at once to plaintiff. So it is held by our Supreme Court in *May v. Lockett*, 48 Mo. 472, l. c. 473. There it is said: "When the tenant leaves, either at the end of the term or by surrender of the lease, the landlord comes into sole possession, and he must be considered as possessed of the premises, though not personally present. And it is not the constructive possession alone arising from title, for that is not sufficient to maintain this action, but a real possession arising from his relation of landlord, had when he put the tenant in, held through the tenant, and continued and become exclusive at the termination of the tenancy, and until he has time by his acts to indicate his intentions in regard to the possession." Following this Judge BLISS, who delivered the opinion of the court, quotes from *Warren v. Ritter*, 11 Mo. 354, l. c. 357, as follows: "Can it be pretended that an owner

of land loses his actual possession, because after the expiration of a tenant's term, and perhaps before the owner can find another, some intruder enters and takes possession? Whether the intruder be a mere trespasser, or have good title, makes no difference." Judge BLISS follows this quotation by the statement (l. c. 474), that "if the landlord when not present were held to be out of possession when the tenant has left, so that a stranger or adverse claimant could enter and hold until ejected by proof of title, the greatest frauds might be practiced and this beneficent statute be deprived of its chief efficacy." The declarations of law, given at the instance of defendant, appellant here, follow the line indicated by these authorities. As stated before when referring to another phase of the case, the conclusion of the trial court on the facts is binding on us, if supported by substantial testimony, if that conclusion is also founded on sound legal grounds. By giving the declarations asked by defendant it is clear that the court had the correct conception of the law as applicable to the facts. The trial court found that the right of possession was in plaintiff. There is substantial evidence to sustain that finding. We have no right in law to disturb it.

Complaint is made to the exclusion of evidence tending to show title in defendant. That evidence was properly excluded. As has been decided in cases without number, the matter of title is of no moment whatever in actions of unlawful detainer—the disturbance is to the possession, and the case must be determined on the relative rights of possession between the parties.

The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

JOHN B. GRANDSTAFF et al., Respondents, v.
NEWTON S. BLAND, Appellant.

St. Louis Court of Appeals. Argued and Submitted May 6, 1912.
Opinion Filed June 4, 1912.

1. **INJUNCTIONS: Mandatory Injunctions: Character of Proof Required.** In an action for a mandatory injunction, the court will not grant the relief unless the evidence clearly establishes the essential allegations of the petition; the burden of proof being on the plaintiff. [Per REYNOLDS, P. J.]
2. **APPELLATE PRACTICE: Injunctions: Scope of Review.** While, on an appeal from an order granting a temporary injunction, great deference is paid to the trial court's conclusion, yet, on a final decree, the appellate court, as in all cases in equity, must consider the entire case on its merits. [Per REYNOLDS, P. J.]
3. **WATERS AND WATERCOURSES: Definition.** The definition of a watercourse, as given in *Benson v. Railroad*, 78 Mo. 504, is adopted. [Per REYNOLDS, P. J.]
4. **——: Natural Watercourses: Sufficiency of Evidence to Establish.** A creek in which there was a flow of water in wet weather only, although pools of water stood in its bed and there were a few springs along it from which water flowed in wet weather, and which was without defined banks in many places, is held by REYNOLDS, P. J., not to be a watercourse. Held, by NORTON, J., that the evidence tends to prove the creek is a natural watercourse. CAULFIELD, J., expresses no opinion on this question.
5. **——: Surface Water.** The common law rule as to surface waters prevails in this state—that is, owners of lands may improve them by obstructing or diverting such waters, provided it be not done in a reckless manner resulting in injury to some other person. [Per REYNOLDS, P. J.]
6. **——: Injunction: Enjoining Interference with Watercourse: Sufficiency of Evidence.** In an action for a mandatory injunction by landowners to compel another landowner to remove a dam constructed by him across, and to fill up a ditch and remove a levee constructed by him along, an alleged natural watercourse, and to enjoin him from further damming up or diverting the flow of water in such watercourse through the lands of plaintiffs, held by REYNOLDS, P. J., that the evidence does not show that the levee, dam and ditch tended to throw

any more water on the lands of plaintiffs than had spread over them during high water before the levee, dam and ditch were constructed.

7. ———: ———: ———: **Statute Considered.** In an action for a mandatory injunction by landowners to compel another landowner to remove a dam, constructed by him across, and to fill up a ditch and remove a levee constructed by him along, an alleged natural watercourse, and to enjoin him from further damming up or diverting the flow of water in such watercourse through the lands of plaintiffs, *held* by REYNOLDS, P. J., that, even though it were established that the creek, along or in connection with which the levee, dam and ditch were constructed, was a natural watercourse, nevertheless defendant's lands being "agricultural lands" and it appearing that the waters from surrounding lands overflowed the south portion of them, defendant was within his rights, under section 6962, Revised Statutes 1899, in constructing the levee, dam and ditch along his own land so as to create a channel for the water, "thus securing proper drainage to such land;" the right given the landowner by the statute being absolute and substantive.
8. **STATUTE OF FRAUDS: Parol License to use Real Property: Evidence.** Where a cut was made and a levee constructed across the corner of a tract of land owned by another, pursuant to permission given by him, the rights thereby created were not within the Statute of Frauds, and parol evidence was admissible to establish them.
9. **LICENSES: Parol License to Use Real Property: Irrevocable Interest.** One making a cut and constructing a levee across the corner of a tract of land owned by another, pursuant to permission given by him and with his assistance, became a purchaser for a valuable consideration, and the landowner could not thereafter revoke the license.
10. **APPELLATE PRACTICE: Disposition of Equity Case: Erroneous Exclusion of Evidence.** Where, upon the reversal of a suit for a mandatory injunction for the prejudicial exclusion of evidence offered by the defendant, it appears that, by reason of such exclusion, the plaintiffs had no opportunity to meet the excluded evidence, the case will be remanded for a new trial, although the excluded evidence is before the reviewing court.

Appeal from Clark Circuit Court.—*Hon. C. D.*
Stewart, Judge.

REVERSED AND REMANDED.

O. C. Clay, Whiteside & Rutherford and A. F. Haney for appellant.

(1) Plaintiffs' cause of action is based upon the charge that defendant is obstructing the channel of a natural watercourse by building a dam across it and diverting the water therefrom onto plaintiffs' lands. To make out their cause of action plaintiff must prove that Doe branch is a natural watercourse. *Benson v. Railroad*, 78 Mo. 504; *Jones v. Railroad*, 18 Mo. App. 251; *Webb v. Carter*, 121 Mo. App. 147; *Hoester v. Hemsath*, 16 Mo. App. 485. (2) It being regarded as surface water, defendant's right to dig the ditch and to drain said water down into the natural depression leading from the southeast portion of his land is undisputed, as that natural depression leads to a natural watercourse. *R. S. 1909*, sec. 5662; *R. S. 1899*, sec. 6962; *Gray v. Schriber*, 58 Mo. App. 173. (3) If it be replied that the maintenance of this dam, levee and ditch, by reason of their diverting the water of the branch to a certain part of the land of plaintiff, is in the nature of a license revocable at the will of the plaintiff, the answer to that is that under the facts of this case the defendant's right to maintain these works is an easement and not a license, according to the controlling decisions of this state. *Baker v. Railroad*, 57 Mo. 265; *School Dist. v. Lindsay*, 47 Mo. App. 134; *Sanford v. Kern*, 223 Mo. 629. (4) The court erred in its rulings excluding the evidence offered by defendant, showing a contract or agreement entered into between defendant and plaintiff John B. Grandstaff for the purpose of disposing of the water. *Power v. Dean*, 112 Mo. 288; *Sanford v. Kern*, 223 Mo. 616.

T. L. Montgomery for respondents.

(1) Doe creek is a natural stream and watercourse and as such was made up, more or less, from

surface water as well as numerous springs along its course before it reached the dam in controversy, with well defined banks, but after this water enters its banks from whatever source and commences to flow within its banks it is no longer considered surface water, although it does not flow continuously during the year. *Jones v. Hanover*, 55 Mo. 462; *Kenney v. Railroad*, 74 Mo. App. 301; *Munkres v. Railroad*, 72 Mo. 514; *Summons v. Winters*, 28 Am. St. Rep. 727; *Gibbs v. Williams*, 37 Am. Rep. 245. (2) Water escaping from this stream or diverted by the dam in question upon the lands of respondents is surface water against which they have a right to protect themselves. *Johnson v. Railroad*, 111 Mo. App. 378; *McCormick v. Railroad*, 57 Mo. 438; *Abbott v. Railroad*, 83 Mo. 271. (3) Any obstruction of the flow of water in a natural watercourse resulting in injury to another person, furnishes such person a right of action however careful the obstruction may have been made. *Edwards v. Railroad*, 97 Mo. App. 103; *Rychlicki v. St. Louis*, 98 Mo. 500; *Paddock v. Somes*, 102 Mo. 237; *Woods*, *Law of Nuisances* (2 Ed.), 1015. (4) A right to flow water over another or to change the course of a natural watercourse can never be created by parol, and is within the Statute of Frauds, and did not and could not ripen into an irrevocable license short of the statutory period of ten years. *Dunham v. Joyce*, 129 Mo. 5; *Tanner v. Valentine*, 75 Ill. 624; *Lead Co. v. White*, 106 Mo. App. 222; *Pitzman v. Boyce*, 111 Mo. 387; *Williams v. Beatty*, 139 Mo. App. 167; *Washburn on Easements* (3 Ed.), pp. 23, 24; *Desloge v. Peace*, 38 Mo. 588; *Fuhr v. Dean*, 26 Mo. 116; *Hurt v. Adams*, 86 Mo. App. 75; *Nelson v. Nelson*, 41 Mo. App. 130; 30 Am. and Eng. Ency. Law (2 Ed.), 344; *Anthony v. Building Co.*, 188 Mo. 704; *Wilmington W. P. Co. v. Evans*, 46 N. E. 1084; *Tiedeman on Real Property* (1 Ed.), sec. 600; *Wilson v. Railroad*, 42 N. W. 600; *Woodward v. Seely*, 50 Am. Dec. (Ill.)

445; Stevens v. Stevens, 45 Am. Dec. (Mass.) 203; Seidensparger v. Spear, 35 Am. Dec. (17 Me. 123) 234; Smith v. Musgrove, 32 Mo. App. 241; Jones v. Stover, 6 L. R. A. (N. S.) 155; Pifer v. Brown, 49 L. R. A. 497.

REYNOLDS, P. J.—This is a suit by plaintiffs, respondents here, for a mandatory injunction—mandatory in that it asks that defendant, appellant here, be required to remove a dam and fill up a ditch and remove a levee alleged to have been constructed by him along what is called a natural watercourse running through the south of defendant's farm and in a northeasterly direction and after passing through plaintiffs' farms and through the southwest corner of an adjoining farm thence in a southeasterly course, as it is claimed—and injunctive, in asking that defendant be restrained from further damming up or diverting the flow of water through what is claimed to be its natural course through the lands of plaintiffs, it being claimed that the waters of this creek, following their natural course and flowing through the lands of plaintiffs, would ultimately pass through sloughs south of plaintiffs' lands and thence into the Mississippi river.

Plaintiffs' farms adjoin each other, that of John B. Grandstaff lying immediately south of the farm of defendant and that of Taylor Grandstaff lying directly south and to the west of the farm of John B. Grandstaff. At the close of the evidence in the case the learned trial judge, under request for a finding of fact, found that what is called Doe Run branch, that being the name given to this stream, "is a natural watercourse and runs through the farm of defendant with well defined banks and bed and that the dam across Doe Run branch, and ditch running south therefrom, built by defendant, diverts the water from its regular channel and causes more water to run on

plaintiff's (*sic*) lands, from said Doe Run branch than when in its original channel." The court by its judgment directed defendant to remove the dam and the levee along the ditch, which he had dug and constructed on his own land but south of this branch, and to fill up the channel or ditch which he had also dug on his own land. From this decree defendant duly perfected appeal to this court.

We have read all the testimony in the case as presented by the abstracts both of appellant and respondents and are not prepared to agree with the conclusion arrived at by the learned trial judge. In the first place, giving the respondents the benefit of the most favorable construction that could be placed upon their testimony, as we would do if this was an action at law instead of a proceeding in equity, we cannot agree that this Doe Run creek or branch is a natural watercourse. This is an action in equity for a mandatory injunction and it is a safe rule of decision to hold that an injunction will not be made perpetual on doubtful evidence. This rule is particularly applicable and of great force when in addition to an injunction to restrain from doing an act it is to be followed by a mandatory order directing the undoing of what has been done. The evidence upon which a court of equity will grant an injunction in cases of this character "must clearly establish the essential allegations of the bill, the burden of proof being on the complainant." [1 High on Injunctions (4 Ed.), sec. 870.] While in an appeal from an order granting a temporary injunction great deference is paid to the conclusion arrived at by the trial court, on a final decree the appellate court, as in all cases in equity, must consider the entire case upon the merits. [2 High on Injunctions (4 Ed.), secs. 1696, 1720.]

Our Supreme Court in *Benson v. Chicago & Alton R. Co.*, 78 Mo. 504, l. c. 514, adopts the definition of a watercourse as given by the Supreme Court of

Wisconsin in *Hoyt v. City of Hudson*, 27 Wis. 656, l. c. 661, as follows: "There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not in legal contemplation watercourses." That has been the accepted definition in this state from that time on. Our court in *Webb v. Carter*, 121 Mo. App. 147, l. c. 153, 98 S. W. 776, quotes the above approvingly, and Judge Goode, who delivered the opinion in that case, cited many other cases in illustration of the rule.

It appears from the evidence in this case that there was only a flow of water in this watercourse in wet weather. It is true that it appears that there were bodies of water in hollows along this branch and a few springs that in wet weather also furnished water but with one exception most of them appear to have flowed only in wet weather. It is held by this court in *Hoester v. Hemsath*, 16 Mo. App. 485, that the fact "wet weather" springs may furnish water, does not constitute the body through which they drain a watercourse.

Apart from the water so occasionally furnished, this branch was, throughout its principal course, through the lands of plaintiffs and defendant, dry—at many places without defined banks—in a part of it, the bed above the dam. We are not prepared to say that it meets the accepted definition of a watercourse.

In *Cox v. Hannibal & St. J. R. Co.*, 174 Mo. 588, l. c. 606, 74 S. W. 854, it is said: "The common law rule as to surface water prevails in this state; that is, owners of lands may improve them by obstructing or diverting it, provided it be not done in a reckless manner resulting in injury to some other person." [See, also, *Abbott v. Kansas City, St. J. & C. B. Ry. Co.*, 83 Mo. 271, and cases there cited.]

We are accordingly remanding the case that the trial court may apply this rule to the facts. Moreover, we have very grave doubt whether the facts in evidence show that the erecting of the dam and levee and making the cut resulted in injury to these plaintiffs. Where this branch enters the farm of the defendant, running northeasterly from and through the northwest corner of John B. Grandstaff's farm, what is called the "old channel" runs in a northerly and easterly course, describing an arc of a circle extending up into the farm of defendant, then as it curves downward and in a southeasterly direction, it passes out of the farm of defendant and cuts into that of an adjoining proprietor to the east of defendant, then south into and through the farms of plaintiffs, apparently in no well-defined course but southerly into a lake and thence through sloughs to the Mississippi river. The dam which defendant constructed is on his own land, directly north of the land of John B. Grandstaff, and defendant cut the ditch from this dam easterly through his land and to a point in the old channel a little south of where that enters the farm of Grandstaff. So that practically all that the dam and ditch do is to straighten the course through the lands of defendant. The levee is south of this cut, between it and the lands of John B. Grandstaff, and it and the new channel cut across a corner of John B. Grandstaff's farm. The evidence in the case does not satisfy us that the construction of the levee, dam and ditch tend to throw any more water on the lands of

plaintiffs than before that had spread over them in times of high water. In point of fact, as it seems clear to us, this work kept the water in bounds; not a particle more went through this new channel than before. Its effect was to save a considerable acreage of defendant from overflowing and this without throwing any larger volume of water on the lands of plaintiffs, or at any other place on those lands than before the construction of these improvements.

But passing that, there is another phase of the case to be considered. Section 6962, Revised Statutes 1899, provided that the owner of land "shall be permitted to construct drains, for agricultural purposes whereby the water will be carried into any natural watercourse, for the purpose of securing proper drainage to such land, without being liable in damages therefor to any other person or persons or corporation." This section was amended in 1909 and now appears in our revision of 1909 as section 5662. As this action was commenced in 1908 and the acts complained of were committed in that year, this section 6962 of the revision of 1899 is controlling. That these lands are agricultural lands is not controverted. As is said by our court in *Gray v. Schriber*, 58 Mo. App. 173, the right given the land owner by this section of the statute is absolute and substantive. Even if it be conceded, therefore, that this branch is a natural watercourse, as it appears that the waters from the surrounding lands overflowed the south portion of the agricultural land of defendant, he was within his right when he constructed the dam, the levee and the ditch, constructing them along his own land and so constructing a channel for the water and thus "securing proper drainage to such land."

It is true that the levee and ditch cut across a corner of the lands of John B. Grandstaff. The defendant offered evidence to the effect that this cut and

levee through the corner of Grandstaff's land were made with his permission, in fact that he had assisted in the work. This was excluded on the ground that it created an interest in the land by parol, it also being in evidence that Grandstaff, after the work was done and before this suit was commenced, had revoked the license. The exclusion of this evidence was error. If on the faith of the license defendant had expended labor and money in the construction of the ditch and levee, and had made the improvement on the faith of the license, "he has become a purchaser for valuable consideration." [Cape Girardeau & T. B. T. R. Co. v. St. Louis & G. R. Co., 222 Mo. 461, 1. c. 484, 121 S. W. 300.]

While ordinarily in suits in equity causes are not reversed and remanded for a new trial, we are compelled to do so here for the reason that while the excluded evidence is before us, plaintiffs, by that evidence being excluded, had no opportunity to meet it by any evidence they may have.

The judgment of the circuit court is reversed and the cause remanded. *Nortoni* and *Caulfield, JJ.*, concur in reversing and remanding, both solely on the ground that the trial court erred in the exclusion of evidence; Judge *Nortoni* being further of the opinion that the evidence tends to prove a natural water-course.

**GAAR-SCOTT & COMPANY, Appellant, v. JOHN H.
NELSON et al., Respondents.**

**St. Louis Court of Appeals. Submitted on Briefs May 6, 1912.
Opinion filed June 4, 1912.**

1. **APPELLATE PRACTICE: Failure to File Transcript in Time: Waiver of Right to Affirmance.** Although the appellant fails to file a manuscript or a "short" record in the appellate court at least fifteen days before the first day of the term to which the appeal is returnable, as required by section 2047, Revised Statutes 1909, yet if the respondent does not produce in such court a certificate of the clerk of the trial court, stating the title of the cause, the date and amount of the judgment appealed from and against whom rendered, the name of the appellant and the time when the appeal was granted, as a basis for a motion to affirm the judgment, in accordance with the provisions of said section, he is not entitled to invoke it.
2. ———: ———: ———: **Laches.** And, in such a case, where the respondent does not move for an affirmance until after the appellant has filed a "short record" and has gone to the expense of preparing and printing the record and a brief, his laches will bar the invocation of the statute to the end of having an affirmance of the judgment.
3. ———: **Failure to File Abstracts and Briefs in Time: Enforcing Rules: Discretion of Court.** Rule 21 of the St. Louis Court of Appeals, which provides that the failure of appellant to file abstracts and briefs within the time required shall result in a continuance or a dismissal of the appeal, at the option of respondent, is subject to enforcement or not, in the discretion of the court; it being the practice of appellate courts, in exercising their discretion in the matter of enforcing their rules, to endeavor to do justice and to prevent a miscarriage of justice which might follow from insistence upon the strict requirements of the rules.
4. ———: ———: ———. In a case where the appellant failed to file abstracts and briefs within the time required by Rules 12 and 18 of the St. Louis Court of Appeals, *held*, that the court would, under the circumstances of the case, exercise its discretion by refusing to enforce Rule 21, providing that the failure to file abstracts and briefs shall result in a continuance or a dismissal of the appeal, at the option of the respondent.

5. **COURTS: "Discretion:" Definition.** The definition, that "discretion is a liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable and wholesome, as determined upon the peculiar circumstances of the case and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law" is possibly too broad, since discretion must always be exercised under the law.
6. **EVIDENCE: Written Contract: Varying Terms: Parol Evidence: Principal and Agent.** Where a contract for the purchase of threshing machinery provided that no person, unless authorized in writing from the seller's home office by an officer thereof, had any authority to add to, abridge, or change the warranty contained in the contract, parol evidence was inadmissible to show that the seller's local agent, not so authorized, had waived provisions in the warranty requiring immediate notice to the seller of any breach thereof.
7. **SALES: Breach of Warranty: Condition Precedent.** A provision of a contract for the sale of threshing machinery, to the effect that the buyer should give notice to the seller by registered mail at its home office and to its local agent of any deficiency on which a breach of warranty was claimed, within six days after the machinery was put in use, was a condition precedent to the buyer's right to claim a breach of warranty, and was not performed by mere notice to the local agent.
8. ———: ———: **Estoppel.** A buyer of threshing machinery, under a warranty requiring him to give notice of defects to the seller by registered mail at its home office and to its local agent, within six days after the machinery was put in use, who failed to give such notice, except to the local agent, and who kept and used the machinery through two or more seasons, was estopped to refuse payment for it on the ground of a breach of warranty.
9. **PRINCIPAL AND AGENT: Unauthorized Admissions of Agent: Evidence: Appellate Practice: Abstract: Omission of Immaterial Matter.** Where a contract for the sale of threshing machinery provided for notice of any defects warranted against to be given by registered mail to the selling company direct, and the local selling agent had no authority to make any representations or waiver with respect to the machinery, correspondence between such agent and the buyers had no bearing on the issue of notice of such defects to the seller, and hence its omission from the abstract of the record was immaterial.
10. **Sales: Breach of Warranty: Estoppel.** A buyer of threshing machinery, who kept and used the machinery through two or more seasons, by writing to the seller in such a way as to con-

vey the idea that he had accepted it and by negotiating for an extension of time for payment for it, estopped himself from claiming failure of consideration by reason of a breach of warranty of the condition of the machinery, in an action by the seller to replevy it on his failure to pay the purchase price.

11. **APPELLATE PRACTICE: Omissions In Abstract: Failure to File Counter Abstract: Presumptions.** Where respondent does not file an additional abstract, as authorized by section 2048, Revised Statutes 1909, it will be assumed that omissions in appellant's abstract relate to immaterial matters.
12. **EVIDENCE: Parol Evidence: Varying or Contradicting Written Contract.** In the absence of fraud, misrepresentation or mistake, parol evidence is not admissible to contradict, vary or enlarge a written contract.

Appeal from Lewis Circuit Court.—*Hon. Chas. D. Stewart, Judge.*

REVERSED AND REMANDED.

O. C. Clay and A. F. Haney for appellant.

Where the contract or order for the sale of machinery contains a written warranty providing that, if the article sold fails, within a specified time after beginning to use it, to comply with the warranty, the purchaser shall give a certain specified written notice thereof to the company at its home office, and that, if the company should afterwards fail to remedy the defect, the purchaser shall return the article to the company at a specified place and give notice of its return to the company at its home office, it is held that these are conditions precedent which must be performed by the purchaser in order to entitle him to set up the defective condition of the property sold to him, as a defense in an action brought against him by the company. *Nichols-Shepard & Co. v. Larkin*, 79 Mo. 264; *Bank v. Westlake*, 21 Mo. App. 565; *Deere, Mansur & Co. v. Hucht*, 27 Mo. App. 1; *Weise v. Birdsall Co.*, 35 Mo. App. 229; *Boyer v. Neel*, 50 Mo. App. 26; *Kingsland v. Board*, 60 Mo. App. 662; *Kingman &*

Co. v. Schulenberger, 64 Mo. App. 548; Nichols-Shepard v. Rhoadman, 112 Mo. App. 299; Bank v. Barts. 130 Mo. App. 635.

Marchand & Rouse, Hilbert & Henderson and E. R. McKee for respondents.

(1) Appellant failed to file transcript or certified copy of judgment and order granting appeal, in this court, before the return term, for which reason respondent contends appeal should be dismissed. Rule No. 16; Rule No. 21; Appleby v. Brock, 76 Mo. 315; Johnson v. Long, 72 Mo. 210; Walter v. Warner, 26 Mo. 143; Zieffle v. Seid, 137 Mo. 538; McCollister v. Railroad, 129 Mo. App. 324; McCaffery v. Railroad, 31 Mo. App. 340; Long v. Hawkins, 178 Mo. 103; Lucas v. Heuston, 168 Mo. 658; Land and Inv. Co. v. Martin, 125 Mo. 114; Grundmeyer v. Placit, 68 Mo. App. 228. (2) Appellant has failed to set forth in its abstract as much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision, nor so much as is necessary to be considered in the disposition of the errors assigned, for which reason respondent contends the appeal should be dismissed. Rule 15; Rule 21; Appleby v. Brock, 76 Mo. 319; Johnson v. Long, 72 Mo. 216; Walther v. Warner, 26 Mo. 143. (3) The judgment in the trial court was for the right party. (4) Respondent had a right to affirm sale and keep the property and interpose defense of breach of warranty. Miles v. Withers, 76 Mo. AApp. 87; Williams v. Baker, 100 Mo. App. 284; Steel & Wire Co. v. Symons, 110 Mo. App. 41; Nichols & Shepard Co. v. Bryeans, 116 Mo. App. 693. (5) Appellant waived its rights to rely on failure of respondents to notify it of failure of machinery to fill warranty if notice was originally required. Machine Co. v. Gardner, 140 S. W. 318; Palmer v. Reeves & Co., 139 Mo. App.

437; Nichols & Shepard Co. v. Bryeans, 116 Mo. App. 693; Miles v. Withers, 76 Mo. App. 87; Williams v. Baker, 100 Mo. App. 284; Steel & Wire Co. v. Symons, 110 Mo. App. 41. (6) Respondent had the right to plead counterclaim or setoff in this action. Harvesting Co. v. Hill, 104 Mo. App. 544; Howard v. Hass, 131 Mo. App. 507; Small v. Speece, 131 Mo. App. 517.

STATEMENT.—This is an action in replevin wherein plaintiff, a corporation, seeks to recover possession of a certain traction engine, a separator, a stacker, a feeder and other farm machinery connected with the threshing of grain.

The answer, after a general denial of the indebtedness, sets up the transaction referred to, as one by which plaintiff, through its agent, sold the property to defendants. Setting up two chattel mortgages and the notes which defendants had executed to plaintiff to secure the payment of the purchase price of the machinery, it is alleged that the machinery was sold by plaintiff for the purpose of threshing wheat and other small grain but that on account of defects in the construction or material used the separator failed to do the amount or quality of work a machine of that kind should do and which plaintiff had represented to defendants that it would do, and that it was worthless for the purpose for which it was sold to defendants. It is further averred that upon discovering this defendants immediately notified plaintiff, through its agent, that the machine would not work properly; that plaintiff through that agent sent two men at different times to put the machinery in order; that these men did nothing which improved its condition, of which fact it is averred that plaintiff, through that agent, was informed and that plaintiff had thereupon assured defendants that the machinery should be put in first class shape and that relying on these assurances, defendants continued to thresh with it during the sea-

son of 1904, and that being informed again by defendants of the defective condition of the machinery plaintiff, through the agent named, urged them to keep the machinery and continue making payments on it and that plaintiff would put it in shape to do first class work in 1905; that plaintiff again sent a man to fix the machinery who did some work on it and assured defendants that it was in shape to do proper work, and defendants, relying upon these statements, again began threshing with the machinery in the season of 1905; but found the machinery inefficient, of which they again informed plaintiff through the agent named. Whereupon it is averred that plaintiff refused to do anything further in connection with the machinery and demanded payment in full of the unpaid notes or of the unpaid balance due. It is further set out in the answer that defendants had paid plaintiff \$500 for the machinery more than it was worth when delivered to them and defendants prayed judgment for the return of the property and for the recovery of \$500 excess paid.

The reply, after denying certain matters set up and admitting that the property was of the value of \$600, as averred, sets up the written contracts under which the machinery was sold to defendants by plaintiff, particularly the warranty contained in those contracts, and the failure of defendants to comply with the conditions precedent attached to the warranty, by failing to give plaintiff the notice required by the provisions of the warranty and by failing to return to plaintiff the alleged defective machinery and failure to give written notice of the return to plaintiff as required by the terms of the warranty and contract when it should appear that any part of the machinery did not fill the requirements of the warranty. Denying the breach of the warranty, the reply also pleads these matters of failure on part of the defendants as waiver and by way of estoppel.

It appears by the testimony in the case that plaintiff, through one John M. Brant, its soliciting agent, procured a written order from defendants addressed to plaintiff, whose home office is in Richmond, Indiana, for a separator and its appurtenances, these to be loaded on the cars at Richmond, Indiana, on or about May 1, 1904, and shipped to Brant, consignee, at La Grange, Missouri, defendants by the terms of this order agreeing to receive this machinery on its arrival, subject to all the conditions of the warranty printed therein, paying therefor \$710, as evidenced by promissory notes and also to give a chattel mortgage on the machinery as a first lien on it to secure the payment of the notes. On that same day, this same agent, Brant, secured from defendants a contract and order for a traction engine, to be shipped by plaintiff on or about November 4th to Brant, as consignee, at La Grange, Missouri, defendants agreeing to receive this engine on its arrival subject to all the conditions of the warranty embodied in the contract order and to pay \$1200 for it, \$200 in cash, the rest in certain notes and in some secondhand machinery taken at an agreed valuation. Separate orders were also taken by the same agent on the same day for the stacker and a feeder. The provisions of the contracts and warranty therein were alike in all these contract orders. Summarized they are that plaintiff was to ship these several pieces of machinery on cars at Richmond, Indiana, on or about the first of May, 1907, consigned to John M. Brant at La Grange, Missouri, who was the local sales agent of plaintiff, in consideration whereof defendants agreed to receive the machinery on its arrival, "subject to all the conditions of the warranty printed below, pay freight and charges thereon from Richmond, Indiana," and to pay the notes mentioned and secure their payment by chattel mortgages on the machinery. The warranty, in substance, attached to these several contracts commenced

this way: "Caution. No person, unless authorized in writing from the home office at Richmond, Indiana, by an officer of Gaar-Scott & Company, has any authority to add to, abridge or change this warranty in any manner, and to do so will render it void and of noneffect." Then follow eight specifications under this warranty, substantially as follows: By the first it was agreed by the parties that the contract is divisible and that each article ordered is ordered and sold at a separate price, it being set out how these prices are to be ascertained, "and that said articles are sold subject to the following express warranty and none other, which said warranty is hereby made to apply separately to each machine or attachment herein ordered."

By the second it is provided that each of the articles of machinery, except the belting furnished on the order, is warranted to be made of good materials, well constructed and with proper use and management to do as good work as any other of the same size and rated capacity made for the same purpose. "If, inside of six days from the day of its first use, any of the said articles of machinery should fail in any way to fill this warranty, written notice (by registered letter) shall be given immediately by the purchaser to Gaar, Scott & Company at their home office Richmond, Indiana, and written notice (by registered letter) also to the local agent through whom the same was received, stating particularly what parts and wherein it failed to fill the warranty, and a reasonable time allowed to the company to get to the machinery with skilled workmen and remedy the defect if any there be (if they be of such nature that the remedy cannot be suggested by letter), the purchaser to render all necessary and friendly assistance and co-operation in making the machinery a practical success. If any part of the machinery cannot be made to fill the warranty, that part which fails shall be im-

mediately returned by the undersigned to the place where it was received, and written notice of said return given to the company at its home office, with the option in the company either to furnish another machine or parts in place of the machine or parts so returned or return the money and notes which shall have been given for the same." This clause also provides in detail for the handling of the notes in case the machinery has been settled for in one series of notes. It is not necessary to consider it.

The third provision is as to the belting, and is not here material.

By the fourth it is expressly agreed that the plaintiff company shall be liable only for the return of cash or notes payable to its order actually received by it and not for any machinery or other property taken thereon as part payment.

The fifth provides that any modification of price or terms of payment shall not in any way affect the warranty and its conditions.

The sixth provides that all warranties are to be invalid and void if the machinery is not settled for when delivered.

The seventh provides that title to the goods shall not pass until settlement is concluded and accepted by plaintiff.

The eighth provides that it is mutually understood that "use of said machinery, after the expiration of the time named in the above warranty, shall be conclusive evidence of the fulfillment of the warranty and full satisfaction to the undersigned, who agree thereafter to make no other claim on Gaar, Scott & Company; . . . neither shall the fact of any local or traveling agent or expert of this company rendering assistance of any nature after the above warranty has been concluded, operate as an extension of the conditions thereof."

This, in the form of a proposal by defendants to plaintiff, is signed by defendants, it being stated above their signatures that they had read the warranty and are acquainted with its contents and accept it. Below these signatures of defendants is the signed acceptance by plaintiff.

It appears by the uncontradicted evidence in the case, and without controversy, that the only notice of the failure of the separator, which seems to be the only part of the machinery of which complaint is made, which was ever given by defendants was by letter and telephone, possibly by telegraph, to this agent Brant, who as clearly appears was a sales agent for plaintiff. There was no affirmative testimony that he had any authority to make any waivers or execute any contracts outside of the original contract and warranty. The men who were sent to make repairs from time to time were sent by him and were his employees and there is no evidence that plaintiff knew of the fact that they had been sent to do this work.

Brant, the local agent, examined as a witness, specifically disclaimed having any power from plaintiff to make repairs. Nor are there any facts or circumstances in evidence as to his course of dealing, which would authorize the jury to either find that he had any such power, or that plaintiff had ratified his acts in sending men to attempt to adjust the separator. There is no evidence whatever in the case of defendants having either within six days from the first use of the machinery, or at any time, either by registered letter or by any other written notice, notified plaintiff at its office in Richmond, Indiana, of any failure or defect whatever in the separator or any other of the machinery. Nor is there any evidence whatever of any tender back of the machinery or any part of it by defendants to plaintiff at any place whatever either at the place where received by defendants or at the home office of plaintiff. The nearest approach to any

written communication from defendants to plaintiff by letter or otherwise as to defects, is a letter addressed by one of the defendants to plaintiff at Richmond, Indiana, of date November 4, 1905. That letter opens as follows: "Yours of October 31, just received. Last year your rig or we were a failure and we did not do much threshing." This is the only reference in it to any defect or failure in the machinery, and was written over a year after the receipt of the machinery. The rest of the letter asks for an extension of time on the notes which were outstanding. It appears that letters were offered and read in evidence between defendants and Brant. They are not in the abstract and not before us. But there was no pretense of evidence that plaintiff saw or knew of these letters or their contents. The machinery was in use by defendants from the time of its receipt in May, 1904, until replevied in this action in February, 1906.

At the conclusion of the testimony in the case plaintiff asked an instruction to the effect that plaintiff is entitled to recover the possession of the specific property claimed in the petition, describing it, and to recover damages for the detention thereof in such sum as the jury may find it has sustained, not exceeding the sum of \$100, the amount claimed in plaintiff's petition, and the jury were instructed to so find. The instruction also embraced the form for a verdict, following the statutory requirement of a verdict in such actions when one is returned in favor of plaintiff. This was refused and exception duly saved by plaintiff. Instructions appear to have been asked by defendants, some of them given, others refused, but none of these instructions are set out in the abstract. The jury returned a verdict in favor of defendants, finding that they were entitled to the return of the property which had been taken from them, plaintiff having given bond, and found the value of the property to be \$600. Judgment followed, adjudging

that defendants have and recover the property described "and that the value on the same is \$600 found to be due defendants by the jury aforesaid together with costs of this suit herein laid out and expended and that execution issue therefor." A motion for a new trial was filed within due time by plaintiff and that being overruled exception was saved and appeal duly prosecuted to this court by plaintiff.

The judgment was rendered in the circuit court on the 2nd day of April, 1910, at the March term of that court. The motion for the new trial and also one in arrest were filed at that term and overruled and at that same term and on that same date application was made by plaintiff for an appeal, affidavit was duly filed praying for an appeal and on that day an appeal was granted to plaintiff to the St. Louis Court of Appeals, with leave to file the bill of exceptions during September, 1910, term of the court, plaintiff filing bond which was duly approved. The time for filing bill of exceptions was extended by the court on various dates and to various times until finally on the 25th of March, 1912, the bill of exceptions which had been tendered, was duly filed and entered of record in the circuit court. A transcript of the judgment rendered and of the order allowing the appeal was filed in this court by plaintiff on the 3d day of October, 1910, that being the first day of the October term of our court for that year. The cause was first set on the docket of our court for hearing on January 10, 1912, that being in the October term of the court. On January 9, 1912, appellant filed a motion for continuance of the cause. When the cause was reached on the call of the docket for January 10th, the motion for continuance theretofore filed by appellant was sustained and the cause continued to the March, 1912, term. The day after, that is January 11th, respondents filed a motion to dismiss the appeal for failure to file the abstract and briefs. That motion was over-

ruled, the cause having been continued. On April 27, 1912, respondents filed a motion to affirm the judgment for failure to file abstract and briefs within the time required by our rules. On the 30th of April, 1912, counsel for appellant filed an abstract of the record and briefs, and on the 6th of May those counsel filed an answer to respondents' motion to affirm the judgment, accompanied by affidavits in support of their answer. The court, having considered these several papers, overruled the motion to affirm. On the same day appellant submitted the cause on abstract and printed brief, respondents being allowed fifteen days in which to file a brief in answer to the brief of appellant, five days thereafter being allowed to appellant to file a reply brief. On May 27, respondents filed their answering brief and on May 28th, appellant filed its reply brief.

REYNOLDS, P. J. (after stating the facts).—The principal part of this answering brief of respondents' counsel is devoted to an attack upon the appeal and abstract. It is insisted in this part of the brief that we should dismiss or affirm for failure of appellant to file the transcript of the cause at the first term following the appeal, that transcript not having been filed until October 3rd, that being the first day of the October, 1910, term of our court. The appeal having been taken on the 4th of April, 1910, during the March term of the circuit court, and more than sixty days prior to our October term, the transcript was due to be filed under the provisions of sections 2047 and 2048, Revised Statutes 1909, to the October, 1910, term of our court, and should have been filed at least fifteen days prior to the beginning of that term. As will be seen by the statement which we have made of the facts attendant upon that, it was not filed fifteen days before that term but filed on the first day of the term. It is provided by section 2047, of the Revised

Statutes above cited, that "All appeals taken sixty days before the first day of the next term" of the appellate court "shall be returnable to such next term." It is also there provided that if the appellant fails to file either a full transcript or in lieu thereof a certified copy of the record entry of the judgment, etc., the respondent "shall produce in court the certificate of the clerk of the court in which such appeal was granted, stating therein the title of the cause, the date and amount of the judgment appealed from, against whom the same was rendered, the name of the party in whose favor the appeal was granted and the time when the appeal was granted, such certificate shall be prima facie evidence of the matters therein stated, and shall be a sufficient basis for a motion in the appellate court to affirm the judgment so appealed from, and the court shall affirm the judgment, unless good cause to the contrary be shown." The respondents in this case have not complied with this provision of the statute. They are not entitled to invoke it, nor are they entitled to invoke the rule of our court made to conform to this law. So it was decided by our court in *Banse v. Tate*, 62 Mo. App. 150, a cause which is referred to approvingly by our Supreme Court in *Ziefle v. Sied*, 137 Mo. 538, l. c. 543, 38 S. W. 963. The statute was also so construed by the Kansas City Court of Appeals in *Bombeck v. Bombeck*, 18 Mo. App. 26. Over and above this, it is decided in these cases, particularly in *Bombeck v. Bombeck*, and in *Ziefle v. Seid*, that where respondent had lain by and suffered the appellant to go on with the appeal as if no such point was to be insisted upon, and had put the appellant to the cost and expense of preparing his full transcript and argument and brief, printing and filing them, that respondent will not be heard to invoke the statute, his laches having led his adversary into an expense which could have been avoided if objection had been made in apt time. It is true that the rules of our court, as do

those of the Supreme Court, provide as a penalty for failure to comply with the rules with respect to filing abstracts and briefs, that the cause shall be continued or the appeal may be dismissed at the option of respondent, but these rules are not so unalterable as to be beyond the exercise of discretion, which every court is often called upon to exercise—meaning always a wise and not merely arbitrary use of power, but discretion in its true meaning, which Black, in his *Law Dictionary* (2 Ed.), page 375, defines to be: “A liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable and wholesome, as determined upon the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law.” Possibly this is too broad, for it always to be understood that discretion must be exercised under the law. This court and the Supreme Court have always exercised their discretion in the enforcement of rules, in an endeavor to do justice, and to prevent miscarriage of justice which might follow by insistence upon the strict requirements of rules of practice. We hold that the case is properly before us by appeal.

Turning to the merits of the case, the principal grounds stated in the motion for new trial and now assigned here are to the error of the court in not sustaining plaintiff’s demurrer or, more properly, in refusing to give plaintiff’s peremptory instruction which we have set out. Error is also assigned to the admission and exclusion of testimony. We hold that these assignments are well made.

No parol evidence should have been admitted to explain or vary the terms of the warranty and of the contract accompanying it. Evidence of Mr. Brant in

connection with the transaction in an attempt to show waiver by him should not have been admitted. Before defendants could invoke the warranty they should have shown compliance upon their part with the conditions, which are conditions precedent to be performed by defendants before any liability whatever attached to plaintiff. The performance of those conditions was essential to a defense against the contract, which depended upon the alleged breach of the warranty. [Nichols, Shepherd & Co. v. Larkin, 79 Mo. 264; Kingman & Co. v. Schulenberger, 64 Mo. App. 548; Nichols-Shepherd Co. v. Rhoadman, 112 Mo. App. 299, 87 S. W. 62; Jasper County Bank v. Barts, 130 Mo. App. 635, 109 S. W. 1057.] In the case at bar these defendants stipulated in writing and above their signatures, that they should give both the agent and the principal notice in writing by registered letter of the alleged defects in the machinery. The terms of the contract and warranty expressly bring home to defendants in this case notice that the principal in the contract is unwilling to be bound by notice to any agent local or otherwise, so that the provision for notice to the plaintiff having designated the place, that is its home office, and within a specified time, that is six days after the receipt of the machinery, is an express provision of the contract which in the case at bar has not been complied with in any respect, save that notice seems to have been given to the agent but none whatever either by registered letter or otherwise to the principal. The substitution of notice to the agent without the consent of the principal was not in any respect whatever within the terms of the contract. [See cases above cited.] It is in evidence in the case at bar that these defendants not only did not avail themselves of the provisions and did not comply with the terms of the contract which they had deliberately entered into, but the correspondence as far as introduced in evidence, or as offered, so far from re-

pudiating the machinery or turning it back or drawing out of the bargain for any cause, distinctly recognizes the existence of the contract, the receipt of the machinery and asks for an extension of time for the payment of it. The defendant kept and used all this machinery through two or more seasons. These are estoppels against defendants from now refusing to pay for the machinery. [Nichols-Shepherd Co. v. Rhoadman, *supra*.]

It is said, however, that all of the letters between plaintiff's agent and defendants which were introduced in evidence and the notes which were offered and introduced in evidence, as well as instructions which were asked on the part of defendants and given by the court, are not before us in the abstract and that therefore we cannot pass upon this phase of the case. Referring to the letters that were said to have been offered and are not in the abstract, it is sufficient to say of them that no matter what may have been in them, it affirmatively appears that this agent with whom this correspondence was carried on had no authority whatever from the principals to make any representations or waiver with respect to this machinery, so that what he said or wrote or what these defendants wrote or telegraphed to him was immaterial to the consideration of the case. The letters between plaintiff and these defendants are in evidence, and as before remarked, on the authority of Nichols-Shepherd Co. v. Rhoadman, *supra*, inasmuch as these letters distinctly carry out the idea of acceptance of the property by defendants and are negotiations for an extension of time of the payment, they estop defendants from now claiming a failure of consideration.

We are unable to say what instructions were asked and given or refused on the part of defendants, as neither party has brought them before us. We assume that if they are material to the decision of this case or would throw a different light upon it, that

respondents, by supplemental abstract, prepared as provided by our rules and as required by section 2048, Revised Statutes 1909, would have brought them up. That section expressly provides that respondent or defendant in error, if dissatisfied with the abstract of appellant, may file an additional or supplemental abstract necessary to cure the defects in the abstract filed by the appellant or plaintiff in error. In the absence of such additional abstract we must assume that these omissions from the abstract of appellant are immaterial and relate to immaterial matters.

On consideration of the whole case and on the evidence that was in the case at this trial and as presented by the abstract, the instruction asked by appellant, plaintiff below, should have been given. That being given, no other instructions were necessary. The trial should have been conducted with reference to the admission and exclusion of evidence on the lines herein indicated; that is to say, parol evidence cannot be introduced in the absence of charges of fraud, misrepresentation or mistake to contradict, vary or enlarge a written contract. The judgment of the circuit court is reversed and the cause remanded. *Nortoni and Caulfield, JJ.*, concur.

FRED SCHAFFER, Respondent, v. P. ROBERTS,
Appellant.

St. Louis Court of Appeals. Argued and Submitted May 9, 1912.
Opinion Filed June 4, 1912.

1. **APPEALS: Docket Fee: Payment in Trial Court not Jurisdictional.** The failure of an appellant to pay the docket fee to the clerk of the trial court in accordance with section 2041, Revised Statutes 1909, is not jurisdictional and does not invalidate an appeal otherwise properly allowed.

2. **BILLS OF EXCEPTIONS: Time for Filing: Act of 1911.** In a case where the "short record" was filed in the appellate court on February 17, 1911, a bill of exceptions, filed in the trial court on April 2, 1912 (which date was before the date appellant was required by Rule 12 of the St. Louis Court of Appeals to serve his abstract), was filed in time, under the Act of March 13, 1911 (Acts 1911, p. 139), providing that, in any case "now or hereafter" pending on appeal, the bill of exceptions may be allowed and filed at any time before the appellant shall be required by the rules of the appellate court to serve his abstract.
3. **LANDLORD AND TENANT: Attachment for Rent: Merchants.** Section 7896, Revised Statutes 1909, authorizing an attachment against a tenant for rent, if he is intending to remove, is removing, or has removed, property from the leased or rented premises, is applicable to a tenant who is carrying on business as a merchant and selling his stock from day to day.
4. **ATTACHMENT: Appeals: Rights of Defendant: Section 2335 Construed.** Section 2335, Revised Statutes 1909, which provides for two judgments in attachment suits, one on the issues raised by defendant's plea in abatement, and the other on the merits of the case, and that, on the trial on the merits, either party may appeal—the plaintiff from the finding on the plea in abatement or on the merits, as he may elect, and the defendant, "if at all, on the whole case"—does not mean that the defendant, on an appeal on the merits, must bring up the attachment proceedings for review, but merely that he may do so, and, if he does not, the matters involved in the trial on the merits are nevertheless reviewable.
5. **COSTS: Creation.** The right to costs is statutory, none existing at common law.
6. **ATTACHMENT: Costs: Landlord and Tenant: Action for Rent: Prevailing Party, who is.** Plaintiff brought an action for attachment under section 7896, Revised Statutes 1909, for rent becoming due thereafter. On a plea in abatement, judgment was rendered sustaining the attachment, whereupon defendant pleaded full payment of the rent as it became due, after the commencement of the action, on which plea judgment was rendered for defendant.
Held by NORTONI and CAULFIELD, JJ., that, under section 2263, Revised Statutes 1909, providing that, except when a different provision is made by law, the prevailing party shall recover costs, the costs accruing both before and after the determination of the issue raised by the plea in abatement should be taxed against plaintiff.
Held, by REYNOLDS, P. J., dissenting, that the attachment was properly brought and the presumption is, that but for it

the rent would not have been paid, and hence that, under section 2275, Revised Statutes 1909, providing that, upon plaintiff dismissing his suit or defendant dismissing the same for want of prosecution, defendant shall recover his costs against plaintiff *and in all other cases it shall be in the discretion of the court to award costs or not*, except in those cases in which a different provision is made by law, it was within the discretion of the trial court to tax against defendant the costs of the attachment which accrued prior to the determination of the plea in abatement; the authority conferred upon the court to thus tax the costs being "a different provision made by law," within section 2263.

Appeal from Jefferson Circuit Court.—*Hon. E. M. Dearing*, Judge.

REVERSED AND REMANDED (*with directions*).

Phil H. Sheridan and *Henry B. Davis* for appellant.

(1) The court should have sustained the objection of the defendant to the introduction of any evidence in this case, it appearing from the pleadings in the case that the debt had been fully satisfied. *Thompson v. Elevator Co.*, 77 Mo. 520; *Murphy v. Smith*, 86 Mo. 333; R. S. 1899, sec. 1547; R. S. 1909, sec. 2263. (2) The instruction No. 1 offered by defendant should have been given. It is admitted by the pleadings and borne out by the proof that no debt was owed by defendant to plaintiff at the time of the trial. *Thompson v. Elevator Co.*, 77 Mo. 520.

R. A. Frazier and *P. S. Terry* for respondent.

(1) In attachment suits, if the defendant appeal he must appeal upon the whole case. R. S. 1909, sec. 235; R. S. 1909, sec. 407; *Bank v. Thornborough*, 109 Mo. App. 639; *Alexander v. Wade*, 107 Mo. App. 321. (2) In attachment suits, the party appealing must give such bond as the courts shall require. R. S. 1909, sec. 2335. (3) Attachments are extraordinary proceedings and the procedure is governed by the attachment act. The bonds required by that act are the bonds that must be given in attachment proceedings.

Link v. Troll, 84 Mo. App. 49; Link v. Troll, 84 Mo. App. 55. (4) Under the act of March 27, 1907, as re-enacted by section 2041, Revised Statutes 1909, the trial court cannot grant an appeal unless the docket fee in the appellate court is deposited with the clerk of the trial court and an appeal granted without such deposit be dismissed in the appellate court. Sager v. Railroad, 127 Mo. App. 22. (5) After suit is brought in attachment proceedings, upon demands not due, if the attachment be abated and the amount be tendered at its maturity, then plaintiff must pay the costs; but if the attachment be sustained, then the plaintiff is entitled to recover the costs from the defendant, for the reason that plaintiff had a right to bring the suit before the rent was due, and if the amount tendered did not include costs which had already accrued, then it was not sufficient to protect defendant from them. Audenreid v. Hull, 45 Mo. App. 202. (6) If plaintiff had a right to bring the suit then defendant is liable for all costs in an attachment suit. Audenreid v. Hull, 45 Mo. App. 202. (7) A change of conditions after an attachment suit is brought does not destroy the attachment lien nor alter the rights of the plaintiff. 3 Standard Ency. Pro. p. 819; Larimer v. Kelley, 10 Kan. 298. (8) The bill of exceptions filed in this case should not be considered for the reason that it was not filed until at least four terms of court had elapsed after the granting of the appeal. Bills of exception die with the term unless a further time is granted by the court. Blanchard v. Dorman, 236 Mo. 416.

REYNOLDS, P. J.—This action was commenced on the 18th of January, 1909, in the circuit court. Plaintiff also sued out an attachment under the provisions of section 4123, Revised Statutes 1899, now section 7896, Revised Statutes 1909. Filing bond, the attachment was duly issued and the defendant's prop-

erty, consisting of merchandise in his store, levied upon but retained by defendant, who gave a forthcoming bond. The object of the action was the recovery of rent payable in monthly installments of forty-five dollars each, the first installment falling due February 1, 1909, the second March 1, 1909, the third April 1, 1909, the fourth May 1, 1909, the fifth on June 1, 1909, the sixth and final installment due July 1st, the total rent which would fall due up to July 1st amounting to \$270. A plea in abatement was filed, issue joined, and trial had thereon on July 19, 1909. The issue on that was found in favor of plaintiff, judgment sustaining the attachment and awarding costs to plaintiff following. Thereafter defendant interposed his answer admitting the execution of the lease and pleading full payment and satisfaction thereof.

The reply admits that defendant had paid the total \$270, but avers that all of it was paid after the institution of the suit, and that at the time defendant paid the \$270, as that amount fell due in monthly payments, defendant knew that this action was pending and that \$36.20 costs had accrued, as shown by the fee bill attached to the reply, and that defendant had neither paid nor offered to pay any of the costs that had accrued in the cause, wherefore plaintiff prayed judgment against defendant for \$36.20 and all costs.

Trial was before the court and a jury on September 22, 1912. At the conclusion of the evidence defendant asked the court to instruct the jury that under the pleadings and evidence the jury would find for defendant. The court refused this, defendant excepting. The court of its own motion submitted an instruction to the jury to determine whether the several amounts mentioned in the petition and involved in this action had been fully paid by defendant and if so when paid. The jury returned a verdict that the rents had all been paid as they fell due. The court

entered up judgment that on the issues submitted to the jury it appeared that the several amounts mentioned in the petition and sued for by plaintiff have been fully paid, whereupon the court ordered and adjudged that plaintiff take nothing by his action and that defendant go thereof without delay (day) in so far as the several amounts sued for in the petition are concerned. The judgment further recited that it appearing to the court from the verdict of the jury on the issues submitted that all sums mentioned in the petition and involved in the action had been paid by defendant to plaintiff subsequently to the institution of the suit, the court found that defendant was liable for the costs accrued in the cause, none of which the court finds had been paid. It was therefore adjudged that plaintiff have and recover of defendant "all the costs accrued in this cause and that he have execution therefor." The judgment further proceeds to set out that it is considered and adjudged that in accordance with the finding of the jury on the plea in abatement in the cause, the attachment be and is sustained and that as the attached property remained in possession of defendant under the forthcoming bond which he gave, it is ordered that that property be delivered to the sheriff of the county, "to the end that the same or enough thereof be sold by said sheriff for the purpose of the payment of the costs accrued in this suit and for the cause of which judgment was rendered against defendant." Defendant in due time filed his motion for a new trial of the cause on the merits and to set aside the judgment. That being overruled, exception was saved and the cause brought here by defendant on appeal.

Learned counsel for respondent have attacked in proper form the abstract in this cause, claiming that the appeal should be dismissed for failure of appellant to pay the docket fee to the clerk of the trial court and that the payment of that is jurisdictional and for

lack of it having been made, the appeal should be dismissed.

In *Reinauer v. Wabash R. Co.*, 210 Mo. 109, 108 S. W. 531, our Supreme Court distinctly ruled that the failure to pay this so-called docket fee to the clerk of the trial court, is not jurisdictional and will not invalidate an appeal otherwise legally allowed, the docket fee having been duly paid to the clerk of the Supreme Court. In this case the docket fee was duly paid to the clerk of this court.

It is also urged as a reason why we should not open up any more than the record proper in the cause, that no bill of exceptions has been filed within the time required by law. The bill of exceptions was signed by the circuit judge and filed in open court April 2, 1912. The transcript of the judgment and order allowing the appeal was filed in this court February 17, 1911. Appellant's abstract was served on the attorney for respondent April 8, 1912, and filed in this court April 9, 1912. The cause was on our docket for hearing May 9, 1912.

Under the provisions of the first section of the act of the General Assembly approved March 13, 1911 (Acts 1911, p. 139), repealing section 2029, Revised Statutes 1909, and enacting a new section in lieu thereof, it is provided: "In all cases now and hereafter pending on appeal in the Supreme Court and in any of the Courts of Appeals, the bill of exceptions therein may be allowed by the trial court, or the judge thereof in vacation, and filed in such court, or with the clerk thereof in vacation, at any time before the appellant shall be required by the rules of such appellate courts respectively to serve his abstract of the record, and for the purpose of determining whether such bill of exceptions shall have been filed within such time such appellate court shall make reference to its docket." By rule 12 of our court, in all cases where, under the provisions of section 2048, Revised

Statutes 1909, the appellant shall have filed in this court a copy of the judgment, etc., in lieu of a complete transcript, as was done in this case, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. It will be seen by the above statement, that that was done in this case, the abstract having been delivered to respondent's counsel thirty days before the appellant was required by our rules to serve a copy of the abstract. The statute and the rule of court have been complied with and the bill of exceptions is properly before us.

Counsel for respondent attack the appeal on another ground, which we will notice later.

Learned counsel for appellant, in oral argument, attack the proceeding by attachment, claiming that what is now section 7896, Revised Statutes 1909, is not applicable to the case of merchants who are carrying on business and selling their stock from day to day. We might dispose of this by saying that the attachment is not before us. We find no exception in section 7896 of the statutes; it is general in its application. No matter in what occupation the tenant may be engaged, when the cause for attachment prescribed by the statute exists, the goods and chattels of that tenant are subject to the provisions of this section. [Buck v. Midland Tobacco Co., 62 Mo. App. 175.]

It appears by examination of the supplemental abstract filed by counsel for respondent, that the jury returned a verdict in favor of plaintiff on the issues joined on the plea in abatement of the attachment. Thereupon judgment was rendered for plaintiff sustaining the attachment and awarding the costs of attachment to plaintiff. There was no motion for a new trial filed as to the proceedings under the plea in abatement of the attachment and no appeal as to the judgment on that in favor of plaintiff by defendant. Following this judgment on the attachment, defendant

answered, plaintiff replied, and the cause went to trial on the merits. On that issue defendant prevailed. Whereupon the court, as we have seen, taxed all the costs of the cause against defendant.

Section 2335 of the revision of 1909, provides that upon the issue raised by the plea in abatement, the plaintiff shall be held to prove the existence of the facts alleged by him as the ground of the attachment, "and if the issue be found for him, and the court denies defendant a new trial of said issue, judgment shall be rendered against defendant, sustaining the attachment, and for the costs of the attachment proceedings, and the defendant may file his bill of exceptions as upon any other matter in the proceedings, and answering to the merits shall not be a waiver of such exceptions, and the cause shall proceed to trial upon the merits." It is further provided in the same section, that "upon the trial of the case upon the merits, either party may appeal—the plaintiff from the finding on the plea in abatement, or on the merits, as he may elect, or both; the defendant, if at all, on the whole case." Here no motion for a new trial on the plea in abatement was filed by defendant, of course none acted upon by the court, nor has the defendant filed any bill of exceptions covering the proceedings upon the plea in abatement. His motion for a new trial, his bill of exceptions cover only the proceedings at the trial on the merits. This being the situation, we are met with a question of first impression as to the application of the statute to these facts. As has been noted, the statute seems to provide for two judgments: one on the plea in abatement, one on the judgment. But it gives a right of appeal only after there has been a judgment both on the plea in abatement and on the merits. When providing for an appeal on the part of plaintiff, he is allowed to appeal either from the finding on the plea in abatement, or on the merits, or on both.

Whereas the defendant, upon trial of the case upon the merits, may appeal, "if at all, on the whole case."

It is rather difficult to determine just what this latter clause means. Does it mean that if defendant appeals, he must appeal from the action on the plea in abatement as well as on the merits, and that unless he appeals as to both, he has no right of appeal at all?

Counsel for respondent contend for this, and assign the failure of defendant to appeal "on the whole case," that is, on both the judgment sustaining the attachment and that on the merits, as fatal to this appeal. We hardly think that is within the meaning of the statute. The defendant may prevail in the attachment and lose on the merits. Is he to be debarred from any appeal unless he also brings up the proceedings under the attachment? We think not. We think that the statute, as to this is permissive—meaning that if defendant appeals at all, he may appeal on the whole case; not meaning that he must do that. It is clearly provided that neither party can appeal at all until judgment goes on the merits. If defendant elects to appeal from the judgment on the merits, and does not elect to bring up the proceedings under the attachment, we hold that he is within his right and can open up any matters involved in the trial of the cause on its merits.

Our court in *Bockhoff v. Gruner*, 47 Mo. App. 22, following the Supreme Court in *State to use v. Beldsmeier*, 56 Mo. 226, held that "a final judgment for defendant on the merits in any attachment suit necessarily dissolves the attachment, regardless of any judgment on the plea in abatement." These decisions were under our law as it stood prior to the Act of 1891 (Acts 1891, p. 45), which act repealed section 562, Revised Statutes 1889, and enacted what is now section 2335, Revised Statutes 1909, in lieu thereof. We do not think that this amendment changed the law un-

der which those decisions were rendered in so far as affects the point under consideration. But neither of these cases touches the question of costs.

We are presented here with a different state of facts from the facts in those cases. When plaintiff commenced his action there was a debt evidenced by the covenants of the lease, not then due, it is true, but to fall due. To secure payment of that plaintiff, having cause to believe that defendant was about to remove his effects from the leased premises, commenced his action by attachment, as authorized by statute, and on the trial of the issue on the plea in abatement of the attachment, the existence of the grounds for the attachment was established by the verdict of the jury. So that it was not a causeless attachment, nor a vexatious or malicious one, as seems to have been the fact in those cases. Here it seems clear that but for the attachment plaintiff was in danger of losing his debt, the rental, as it was to fall due.

Between the institution of this action and the filing of the answer to the merits, defendant chose to pay all the installments of rent as that rent became due. The jury found that at the time of the trial of the cause on its merits he had paid all the rent. The installments seem to have been sent to plaintiff in the form of checks as each monthly installment of rent fell due, and this without any demand from plaintiff. Plaintiff accepted each payment without reservation, without any mention of or understanding as to the payment of costs. The majority of the court think that under the decision of our Supreme Court in *Thompson v. Union Elevator Co.*, 77 Mo. 520, plaintiff is liable for all the costs as well those accruing before as after the determination of the issue on the plea in abatement. I do not think that the case at bar is such an one as is presented in *Audenreid v. Hull*, 45 Mo. App. 202, a case relied on by counsel for respondent. In that case there was a tender but no acceptance. Here

plaintiff accepted the payments: there he refused, and I think as to the taxation of the costs which had accrued under the attachment, a different question is presented.

Section 2263, Revised Statutes 1909, provides that in all civil actions the party prevailing shall recover his costs against the other party, "except in those cases in which a different provision is made by law." The right to costs is statutory, none existing at common law. [*City of St. Louis v. Meintz*, 107 Mo. 611, 18 S. W. 30.] If this section 2263 stood alone I have no doubt that the learned trial court was in error in taxing any of the costs against plaintiff. But we have another section of the statute that I think must be taken into consideration. That is section 2275, Revised Statutes 1909, which reads: "Upon the plaintiff dismissing his suit, or defendant dismissing the same for want of prosecution, the defendant shall recover against the plaintiff his costs; and in all other cases it shall be in the discretion of the court to award costs or not, except in those cases in which a different provision is made by law." As the corresponding section appeared in the Revised Statutes of 1845, it read: "Upon the complainant dismissing his bill in equity, or defendant dismissing the same for want of prosecution, the defendant shall recover against the complainant his costs; and in all other cases in equity, it shall be in the discretion of the court to award costs or not, except in those cases in which a different provision is made by law." [R. S. 1845, sec. 18, art. 1, chap. 35, p. 244.]

Our Supreme Court construed this section in connection with what is now section 2263, in *Walton v. Walton*, 19 Mo. 667. That was an action in equity decided in 1854, but under sections 6 and 18 of the chapter and article of the revision of 1845 above cited. It appears from the statement of facts in the case that after the cause had been first tried and taken on ap-

peal to the Supreme Court where it was reversed and remanded, the defendant was permitted to file an amended answer, inserting in that answer an additional item of money paid since the former judgment, for which he claimed he should be credited in taking the account. It was by the interposition of this payment, made after the institution of the action, that the demand of plaintiff was not only wiped out but defendant became entitled to and recovered a judgment against the plaintiff for a small amount. The trial court taxed the costs against the plaintiff, who moved to set this aside and tax them against the defendant. That motion being overruled, he appealed to the Supreme Court. Judge RYLAND, after quoting the two sections of the statutes above referred to, says (l. c. 668) that although this contention of the complainant may be strictly just and equitable, "still it does not take away the discretionary power of the court below. The question here is, not what this court would have done in the premises, had the case been before us, as a court of original jurisdiction, but whether the court below has abused its discretion. We are not willing to say that there has been an abuse of such discretion in giving costs for the defendant in this action." The judgment of the circuit court was accordingly affirmed.

It is true that that was an action in equity while the one before us is an action at law. That decision was rendered in a cause occurring prior to the adoption of our code by the act approved February 24, 1849. That code, as is of course well known, by the first section abolished the distinction between actions at law and suits in equity. From then on we have had in this state but one form of civil action. Following this abolition of the distinction between actions at law and suits in equity in the revision of 1855, while what now appears as section 2263 of the revision of 1909 appeared word for word as it had in the revision of 1845, there known as section 6, chapter 40, article 1, page

442, what had been section 18, article 1, chapter 35, of the revision of 1845 and before referred to, appears in the exact wording of what is now section 2275, Revised Statutes 1909, appearing as section 18 of article 1, chapter 40 of the revision of 1855.

While it is true that it has always been held in our state that in equitable actions the taxation of costs or their apportionment between the parties was in the discretion of the court, no case has been found in which a construction of this section 2275 has been involved, which limits that section to suits in equity. To do that would involve separation of actions at law from suits in equity, in so far as this is concerned. While it is also true that our courts have held that notwithstanding the abolition of the distinction between the forms of action, the principles upon which the two classes of causes are to be determined are still preserved, this cannot and does not reach the point here involved, and certainly does not create a distinction which the amendment to old section 18 has clearly abolished. Certainly we find no case overruling the decision in *Walton v. Walton*, *supra*. It was referred to in *Ellison v. Ralston*, 19 Mo. App. 537, l. c. 540, but with the remark that it was a case which arose under the old chancery practice where the statute followed the rule of the English chancery practice, that the granting or refusal of costs was in the discretion of the judge of the trial court. The learned judge who wrote that opinion, however, overlooked the fact that section 18 of the revision of 1855, before referred to, now section 2275, Revised Statutes 1909, was not merely a change of section 18 of the revision of 1845, before referred to, of the name from complainant to plaintiff, but was made to meet the new code which had abolished the distinction between actions at law and suits in equity. *Walton v. Walton* is cited approvingly by Judge Rom-

BAUER in *Redman v. Thomas*, an action at law, 39 Mo. App. 143, l. c. 146, in support of the proposition that this court cannot say "under the facts shown by the record, that the court abused its discretion in awarding costs, provided it had any discretion, as such abuse must be manifest to authorize us to interfere." It is cited approvingly by Judge NORTON in *In re Wilson*, 95 Mo. 184, l. c. 188, 8 S. W. 369, a cause originating in the probate court, in support of the proposition "that the erroneous exercise of judicial discretion is properly reviewable by an appellate court," citing also *Carr v. Moss*, 87 Mo. 447. In this latter case (l. c. 450), Judge HENRY says that the Supreme Court is not "disposed to interfere with trial courts in the exercise of the discretion with which the statute has invested them, except where there has been a manifest abuse of that discretion."

It seems very illogical to hold that this section applies only to suits in equity, when it specifically refers to all actions and when our code has abolished all distinction between actions at and suits in equity. It therefore seems clear to me that we are controlled in this case by the decision of our Supreme Court in *Walton v. Walton* and must hold that the taxation of costs in this case, although an action at law, was, under section 2275, within the discretion of the trial court. Unless we are prepared to say that there was an unwise exercise of the discretion lodged in him or an abuse of that discretion, I think we are bound by the action of that learned court in the taxation of costs accrued in the attachment branch of this cause against the defendant. As before remarked, the facts of the case, as established by the verdict of the jury on the plea in abatement, established beyond question the fact that the attachment was properly brought and the presumption is that but for the levy of the attachment and the seizure of the goods of the defendant plaintiff would have lost his debt. I am therefore clearly

of the opinion that under the circumstances and facts in the case, it was within the discretion of the learned trial court to tax the costs of the attachment against defendant.

So far as the judgment seems to tax the costs of the whole case against the defendant, I do not think that the discretion of the learned trial court was properly exercised. All the costs in the case that accrued subsequent to the determination of the plea in abatement, as evidenced by the verdict of the jury and the judgment of the court on that issue, should be taxed against the plaintiff, he having received full satisfaction of his debt pending the final disposition of the case.

I do not think the decision in *Murphy v. Smith*, 86 Mo. 333, one of the cases relied on by my learned associates, meets the facts here before us. Nor do the facts in the case of *Thompson v. Union Elevator Co.*, supra, meet the facts here in evidence. In this latter case there was a stipulation as to dismissal and that stipulation made no provision as to costs. All that is there decided is that the parties having failed to provide for costs, they are to be taxed in the usual manner as on dismissal by plaintiff.

While I think that the judgment of the circuit court must be reversed for the reason above stated, and the cause remanded, I think it should be with directions to the circuit court to enter up judgment for plaintiff as to taxable costs connected with the attachment to and including the determination of the issue under the plea in abatement, and for defendant as to all taxable costs accruing since that determination. Section 2263 provides for recovery of costs by the prevailing party, "except in those cases in which a different provision is made by law." I think that when section 2275 provides that upon plaintiff dismissing his suit or defendant dismissing the same for want of prosecution, neither of which here oc-

curred, "a different provision is made by law," and that that different provision has here intervened. It is provided by this same section that "in all other cases it shall be in the discretion of the court to award costs or not." This case, as I think, presents a situation outside of the general rule and is one of the "other cases," not within the first clause of either section. The provision in the attachment act, that if the attachment is sustained, plaintiff shall recover his costs, is a positive enactment: is a case in which "a different provision is made by law" for the recovery of costs. Plaintiff did sustain his attachment and was awarded his costs. To entirely reverse takes them from him. Under the facts in this case I think it was within the discretion of the trial court to allow him those costs adjudged him in the attachment, although he lost the case on final trial, it appearing that preceding the final trial defendant had paid the debt, and plaintiff could not therefore recover on that.

Judges NORTON and CAULFIELD, however, do not concur in the view that the costs should be apportioned between plaintiff and defendant. They believe that under the decisions of our Supreme Court in *Thompson v. Union Elevator Co.*, *supra*, and *Murphy v. Smith*, *supra*, no costs whatever can be taxed against defendant and that all of them must be taxed against plaintiff, the latter not having prevailed and not being entitled to prevail in the trial upon the merits. They are of the opinion that the judgment should be reversed and the cause remanded with directions to the circuit court to tax all the costs against plaintiff. Accordingly it is so ordered.

J. A. GRAY, Respondent, v. ISAAC A. NOVINGER,
Appellant.

Kansas City Court of Appeals, April 29, 1912.

REAL ESTATE BROKER: Dual Agency: Pleading: Amendment. Dual agency of a real estate broker, unknown to the parties, will defeat a claim for commission for bringing the parties together in an effort to consummate an exchange of property. But to be available as a defense it should be pleaded: If the dual agency is not known to defendant until during the progress of the trial, he should obtain leave to amend his answer.

Appeal from Adair Circuit Court.—*Hon. Nat. M.*
Shelton, Judge.

AFFIRMED.

Campbell & Ellison and *P. J. Reiger* for appellant.

Smoot & Cooley and *Weatherly & Frank* for respondent.

ELLISON, J.—Plaintiff instituted this action to recover a commission alleged to be due him as defendant's agent in the sale of a herd of thoroughbred registered cattle. The judgment in the trial court was for the plaintiff.

There was evidence tending to prove that plaintiff brought one Hinson and defendant together in a prospective trade or exchange and that defendant authorized plaintiff, as his agent, to submit to Hinson a proposition to trade his herd of cattle for Hinson's farm encumbered by a mortgage for \$3800, defendant to pay Hinson \$500 in addition. That plaintiff then got the parties together and Hinson accepted the offer, but without proper excuse or any good reason defendant

refused to consummate the trade. The evidence in defendant's behalf in substantial part was contrary to that of plaintiff, and as the jury have found for plaintiff, we must affirm the judgment unless there be error in the conduct of the trial.

The first objection is that plaintiff was allowed to testify that he made an unsigned memorandum of the terms of defendant's proposition to be submitted to Hinson. This was drawn out on the cross-examination of plaintiff, and besides, we think, in view of the record, it had no bearing on the result.

The next complaint relates to plaintiff's instruction number one, purporting to cover the whole case and directing a verdict on the matters therein submitted, but omitting the issue made by the pleadings that Hinson was able and willing to carry out the proposition he accepted. The instruction does not, in terms, submit that hypothesis, of Hinson being able to carry out his part of the proposition, though it does submit his being willing to do so. His ability to do so seems to have been assumed throughout the trial and defendant's first instruction is drawn along the same line with plaintiff's. Considering the instructions together, it leaves defendant without room for complaint.

The next objection relates to the action of the trial court on the subject of dual agency; it being contended by defendant that plaintiff was acting as the agent for both parties. Dual agency was not pleaded, and in order to avail defendant as a defense, it should have been: *Reese v. Garth*, 36 Mo. App. 641.

We are cited by defendant to *Sprague v. Rooney*, 104 Mo. 349, 360, and *Chapman v. Currie*, 51 Mo. App. 40, 45. Those cases were overruled in *St. Louis Assn. v. Delano*, 108 Mo. 217, 220, and *McDearmott v. Sedgwick*, 140 Mo. 172, 182. In the latter cases it is said that where the face of the petition indicates nothing other than a valid contract, the rule is that if the con-

tract is to be invalidated by reason of some extrinsic matter, such matter must be pleaded in order that it may be issuable at the trial. Such defense is likened to champerty, gaming and usury; and "when the illegality does not appear from the contract itself or from the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter, and must be pleaded in order to be available."

In this case nothing appears on the face of the petition or of the contract pleaded, disclosing any illegality. Matters *aliunde* shows the illegality, and these must be pleaded. Defendant cites us to Corder v. O'Neill, 207 Mo. 632, but the dual agency was specially pleaded in that case. Other cases cited do not apply to the question.

But defendant says he did not know of such double agency until during the course of the trial. Leave should then have been asked to amend his answer by setting up that defense.

We discover no error in the trial and hence affirm the judgment. All concur.

PRICE ROMJUE et al., Defendants in Error, v.
OLLIE RANDOLPH et al., Plaintiffs in Error.

Kansas City Court of Appeals, April 29, 1912.

1. **WILLS: Life Estate: Power of Disposal: Enlargement to Fee.** If property is by will given to another for life, though with full power of sale in the devisee, the estate is one for life only, and the authority to sell is but a power; the rule being that if a life estate is clearly given, it is not enlarged to a fee by subsequent power of disposal.
2. **——: Devise Generally: Power of Sale: Remainder.** If property is by will given to another generally, with full power of disposal, the devisee takes an estate in fee, and an attempted limitation of a remainder to a third person is void.

But if the property is not given generally to the first taker, but specifically for his life, then a power of sale will not enlarge the life estate into a fee.

3. ———: ———: Husband and Wife: Joint Will: Survivor. A husband and wife, without children of their own, made a joint will containing the following clause: "We each will, bequeath and devise, to the other surviving all the property, real, personal or mixed, of which we or either of us shall die seized, with full power of disposition for and during the life of such survivor." And by a subsequent clause they willed the remainder of their estates to three persons, in equal parts, or their descendants. The husband died first and it was held that the wife took a life estate. And that each gave a life estate to the survivor, and both gave the remainder to the three persons.
4. ———: ———: ———: Lapse: General Estate. A husband and wife, without children of their own, made a joint will, whereby they each gave a life estate to the survivor and the remainder to three persons in equal parts, or their descendants. The husband died, and afterwards one of the three devisees died without issue, and then the wife died. It was held, that the devise to the deceased devisee lapsed, since he did not leave descendants. His share of the estate would remain as general estate of the two testators and would go to their statutory heirs in the proportion of the original estate of each of them.
5. ———: ———: ———: Descendants. The word "descendants" is held not to mean collateral kin, such as brothers and sisters, but direct issue from the body, including grandchildren to the remotest degree.

Error to Macon Circuit Court.—*Hon. Nat. M. Shelton*, Judge.

REVERSED AND REMANDED.

R. L. Matthews and *John T. Barker* for plaintiffs in error.

Dan R. Hughes and *John R. Hughes* for defendants in error.

ELLISON, J.—James A. Lea and Nancy Lea were husband and wife without issue of their own, but they had raised to manhood and womanhood three children,

Nancy May, Ollie Greer and Albert Lea. They made the following will:

"2. We each will, bequeath and devise, to the other surviving all the property, real, personal or mixed, or which we or either of us shall die seized, with full power of disposition, for and during the life of such survivor.

"3. We each will, bequeath and devise all the rest, residue and remainder of all the property, real, personal and mixed, remaining undisposed of at the death of the survivor, in this will jointly made by us, to the beloved children, hereinafter named, whom we reared as follows: To Nancy May, . . . to Albert Lea, . . . to Ollie Greer; to be equally divided between them and their descendants, to the exclusion of our next of kin, under the laws of descent and distribution, in the absence of any children being born of our union, and we now state that at the making of this will no children having been so born."

James, the husband, died and subsequently the young man Albert died without issue; then, afterwards, Nancy, the surviving wife, died, and there was thus left only Nancy May and Ollie Greer. Nancy left collateral kin only and Albert left brothers and sisters. The question for decision is, who takes the one-third interest in the property originally devised to Albert. The collateral kin of Nancy claim it as coming to them through her; the brothers and sisters of Albert claim it as coming through him, and Nancy May and Ollie Greer claim it as surviving joint tenants.

The trial court decided that Nancy took an absolute estate and that the devise to Albert lapsed by reason of his death prior to Nancy's decease.

If the second clause of the will was an absolute devise to Nancy, then the last part of that clause, seemingly limiting the estate to one for life, would be void. For, "It is a settled rule or American as well

as English law that when the first devisee has the absolute right to dispose of the property in his own unlimited discretion and not a mere power of appointment among certain specified persons or classes, any estate over is void, as being inconsistent with the first gift." And, "If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over the property which he, dying without heirs, should leave, or without selling or devising the same; in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will." [Jackson v. Littell, 213 Mo. 589.]

It is said that "A power to dispose of a thing as one pleases, must necessarily carry along with it a full property in it." [Ibid.] The same rules are stated in Gannon v. Albright, 183 Mo. 238. A devise of an estate generally or indefinitely, with power to dispose of the same, vests the fee simple in the devisee, and no subsequent ambiguous limitation will lessen the estate. [Cook v. Couch, 100 Mo. 29; Small v. Field, 102 Mo. 104; Roth v. Rauschenbusch, 173 Mo. 582.]

So in Jackson v. Robins, 16 Johns. 537, 587, 588, where the testator devised "all my real and person estate whatsoever unto my dear wife Sarah, to hold the same to her, her executors, administrators and assigns, but in case of her death without giving, devising or bequeathing by will or otherwise selling or assigning the said estate, or any part thereof, then I do give, devise and bequeath, all such estate or all parts thereof as shall so remain unsold, undevised or unbequeathed, to my daughter," it was held that the first part of the clause gave a fee to the wife and the remainder over

to the daughter was void. It being said that the power and right to sell was itself "an attribute of ownership and carries with it a fee;" and that it was "an incontrovertible rule that where an estate is given to a person generally or indefinitely with a power of disposition, it carries a fee."

But the power of absolute disposal over property will not operate as the devise of a fee in realty, or absolute title in personalty, where a life estate only is devised. [Grace v. Perry, 197 Mo. 550; Tisdale v. Prather, 210 Mo. 402.] In such case the life estate is not enlarged by unrestrained power of sale, but such power is merely one of appointment, which, if not exercised, leaves the estate in remainder. It is proper enough to say that a devise of an estate generally, with power of absolute sale, passes the fee. But the devise of an estate for life is not a general devise, or, as otherwise expressed, is not a "gift generally or indefinitely." Its duration is limited to a life by its own terms. Thus, in Rubey v. Barnett, 12 Mo. 3, after recognition of the rule in accord with the authorities above cited, it is said: "But a devise to a wife for life, and after her decease she to give the same to whom she will, passes but an estate for life with a power; yet if an express estate for life had not been devised to the wife, an estate in fee would have passed by the other words."

"This," says the court, "is the distinction which prevails throughout the cases. When an express estate for life is given, and afterwards a power of disposition is conferred, then the devisee takes but a life estate with a power of disposition, and if no disposition is made, the reversion will go to the heirs of the devisor. But if there is no previous devise of a life estate, but a simple power of disposition is bestowed, then the devisee takes an absolute estate."

The rule thus stated by Judge SCOTT more than sixty years ago, is sound today, because it rests upon

the plain duty of the courts to administer the intention of the testator when not contrary to general law.

That the absolute power of disposal is a gift of the absolute property is the dictate of common sense, says Judge Tucker, in *Burwell v. Anderson*, 3 Leigh, 348. And further, that: "He who has the absolute property, has, inseparably, the absolute power over it; and he to whom is given the absolute power over an estate, acquires thereby the absolute property; unless there is something in the gift which negatives and overthrows this otherwise irresistible implication. . . . So, though a devise to a wife for life, and after her decease, she to give the same to whom she will, passes but an estate for life with a power; yet, if an express estate for life had not been devised to the wife, an estate in fee would have passed by the other words. Where, indeed, such an inconsistent life estate is given, the fee does not pass; for this whole matter rests upon intention. . . . Where an interest is given, generally, and without limitation, that gift is not converted into a mere power, by annexing thereto a general power of disposition. . . . But where there is an express and inconsistent estate for life given, the construction of the instrument is altogether different. For the express estate for life, negatives the intention to give the absolute property, and converts these words into words of mere power, which, standing alone, would have been construed to convey an interest."

The rule is written in the same way in numerous cases: "If the testator, in express terms, give an estate for life, the intention is manifest and beyond doubt; and in such case an added power of disposition cannot enlarge the estate." [*Burleigh v. Clough*, 52 N. H. 267.]

In *Mansfield v. Shelton*, 67 Conn. 390, four rules relating to this general subject are stated, the second of which is that: "A life estate expressly created

will not be converted into a fee, absolute or qualified, or into any other form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive."

In *Collins v. Wickwire*, 162 Mass. 143, the will gave the property to the testator's wife, "during her natural life, with the right to dispose of the same by gift, or will at her decease;" and the principle that where a will gives an absolute ownership with full power of disposal, a limitation over is void because inconsistent with an absolute title, was invoked. But the court said that the principle was not "applicable where the will purports to give only a life estate to the first taker, with merely a power of disposition of the remainder as a separate interest."

In *Swarthout v. Ranier*, 143 N. Y. 499, the provision in the will was that the wife was to have the estate during her life, but it also gave her power to dispose of it, yet it was held to be a life estate with a power.

In *Ramsdell v. Ramsdell*, 21 Me. 288, the court, after discussing the authorities, says: "The rule to be extracted from these cases would seem to be, that where a life estate only is clearly given to the first taker, with an express power on a certain event or for a certain purpose to dispose of the property, the life estate is not by such a power enlarged to a fee or absolute right; and the devise over will be good." To the same effect is *Wood v. Robertson*, 113 Ind. 323.

In applying these rules of construction to this case, we will simplify the provision in question by changing the words so that it will read as a single, instead of a joint will. It then would be that "I will, bequeath and devise to my wife Nancy all the property, real, personal or mixed, of which I shall die seized, with full power of disposition, for and during her life." There is but one possible suggestion in

avoidance of the plainly expressed intention to devise a life estate, and that is to say the testator placed the life limitation on the power to dispose of the estate, instead of upon the estate itself. But that would be altogether fanciful, for two reasons: One, that it would be useless to limit the power of making disposition of the property to her life, since the end of life would, itself, put an end to the power of disposal; and the other is that the subsequent clause 3, devises the property which she may not dispose of to the persons therein named, thus showing it was the intention that her right of property ended with her life.

It seems to us to be manifest that each testator gave to the other a life estate in their respective estates, and both gave the remainders existing at the death of the survivor, to the three persons named, to be divided equally between them or their descendants.

To whom, then, did the property go on Nancy's decease? The will says to the three devisees, to be equally divided between them, or "their descendants." We have already stated that Albert died before Nancy and as it appears that he left no children, but did leave brothers and sisters, the first question on this branch of the case is, are brothers and sisters of a deceased, his descendants, within the meaning of the will? Ordinarily they are not. [Lich v. Lich, 158 Mo. App. 400.] By descendant from a person we mean one who comes *from* him, not one who may be collaterally connected *with* him. "Descendants" means "those who have issued from an individual, including his children, grandchildren, and their children to the remotest generation." [Tichenor v. Brewer, 98 Ky. 349; West v. West, 89 Ind. 529; Gordon v. Pendleton, 84 N. C. 98; Van Beuren v. Dash, 30 N. Y. 393.]

"A descendant is a person who is descended from another, that is, one who proceeds from the body of another, however remotely. The word is the converse or opposite of ascendant. Descendants include every

person descended from the stock referred to. It is co-extensive with issue, but does not embrace others not of issue. It is not to be understood as meaning next of kin, or heirs-at-law, for these phrases comprehend persons in the ascending as well as the descending line, and may also include collaterals; but it does mean the issue of the body of the person named, of every degree, such as children, grandchildren and great-grandchildren, and all others in the direct descending line. And when the term 'descendant' is used in a will, it means only lineal heirs, those in the direct descending line from the person named, unless there is a clear indication of intention on the part of the testator to enlarge its meaning. And so it has been held that 'descendants' is a good term of description in a will, and includes all who proceed from the body of the person named, to the remotest degree. And this is the ordinary meaning applied to the word 'descendants,' not only by the profession, but by the laity." [Bates v. Gillett, 132 Ill. 287. See, also, 9 Am. & Eng. Ency. Law (2 Ed.), 399; 14 Cyc. 38; Rood on Wills, sec. 446, 2 Underhill on Wills, sec. 677.]

But counsel says that the expression "descendants" may, in some contexts, mean a brother or sister. If so, there is no sign of such meaning in this will. Inferences are strong to the contrary. Neither of the three devisees were children of the testators and there is no expression in the will to lead one to suppose there was any kinship, unless it be that Albert bears the same name. The moving cause of the gifts appears to have been affection arising from the association consequent upon having "reared" them. Naturally the testators had no interest, aside from them individually, which would reach further than their descendants. There is nothing in the words of the will, nor in the situation, to lead one to believe the testators meant their bounty to go to any one outside the immediate line of the devisees.

Albert dying without descendants, the legacy lapsed as to his interest. The statute (Sec. 546, R. S. 1909) saves lapsing only in cases where the "child, grandchild or other relative of the testator" dies "leaving *lineal* descendants."

But it may be said that each of the children took an estate in remainder, and though subject to be destroyed by an exercise of the power of sale by the life tenant, nevertheless it was a present interest, even during the existence of the life estate, only liable to be destroyed by an exercise of the power. And, therefore, it was a vested interest in Albert, Nancy May and Ollie, on the death of either of the testators, which could be assigned by them; or, on their death, intestate, would go to their heirs. Therefore Albert, having survived the testator James, there was cast upon him an estate in remainder, and whether considered as a vested or contingent remainder, it nevertheless was an estate or interest which, on his death intestate, would go to his heirs.

To this we say that would be true ordinarily. [Welsh v. Woodbury, 144 Mass. 542; Winslow v. Goodwin, 7 Met. 363; Putnam v. Story, 132 Mass. 205; Grosvenor v. Bowen, 15 R. I. 549; Scofield v. Olcott, 120 Ill. 362.] But, by the terms of the will here in controversy, the estates to Albert and the two other children, were not estates in remainder generally. The estate or interest of each was limited to their "descendants" if either of them should die. So, therefore, as already said, Albert dying without descendants, his legacy lapsed.

We have examined Lemmons v. Reynolds, 170 Mo. 227, and think it has no bearing on the questions presented in this case.

We do not find anything in the will justifying the claim of Nancy May and Ollie Greer. There is nothing to show them to be joint tenants. They own two-thirds of the estate and are tenants in common with

the owner of the other third, lapsed by Albert's decease. If the devise had been to a class, as to the children of A, then, if not prevented by statute, the survivors of the class at the testator's death would take the whole. But there is no possible ground for taking from them their distinctive individuality as devisees and putting them together as one entity or class.

The result is that the share which would have gone to Albert, had he lived, is undisposed of and, ordinarily, would belong to the general estate of the testator and be inherited by his statutory heirs. But in this case there arises this exceptional state of affairs: There are two testators in one will, with no distinction as to what particular property belonged to each, or whether it belonged to them jointly.

The result is, that after handing over to the two surviving devisees their undivided two-thirds of the whole estate, there remains one-third to go to the statutory heirs of both the testators. Then the question arises as to how the shares of the latter two sets of heirs are to be ascertained. We know of no better answer than to say that each set will inherit what is left of their ancestor's estate after taking out the two-thirds going to the two surviving devisees. And in order that justice may be done, as near as may be, it would appear proper that this two-thirds should be taken from the two estates proportionately. That is, if one testator left a greater estate than the other, a proportionately greater part of the share of the two devisees should be taken from it. Thus, for convenience, suppose the two estates were in money, amounting, together, to \$12,000, of which James' estate was \$9000 and Nancy's \$3000. That would be \$8000 for the two devisees, \$6000 of which would be taken from the \$9000 composing James' estate, and \$2000 would be taken from the \$3000 composing Nancy's estate. And that would leave \$3000 to go to the statutory heirs

of James and \$1000 to go to the statutory heirs of Nancy.

We have no means of knowing how or in what proportions the property was owned by the two testators, but believe the views herein expressed will enable a proper disposition to be made of the case. The judgment is reversed and cause remanded. All concur.

WILLIAM T. PETTY, Executor, Appellant v.
JAMES H. TUCKER, Respondent.

Kansas City Court of Appeals, May 13, 1912.

1. **SUBROGATION: Insane Person: Volunteer.** If one pays the debt of an insane person, which is secured by mortgage on real estate, and makes the payment in order to prevent a sale under the mortgage and save the property for the insane person, he is not a volunteer and may be subrogated to the rights of the mortgagee in the mortgage debt.
2. ———: ———: ———: **Limitations.** If one pays the mortgage debt of an insane person in order to save it from sale under the mortgage, an equitable obligation arises in favor of the party making the payment and he has a right of subrogation to which the five years period of the Statute of Limitations applies, which he must assert within that time and not the period applicable to the limitation of the original debt.
3. ———: ———: ———: **New Promise: Writing: Contract: Statute.** In order to revive an obligation due from an insane person to one who pays his mortgage debt to prevent a sale of his land, the promise of the insane person, after becoming sane, to reimburse the party making the payment, must be in writing. The Statute of Limitations in using the word "Contract" in reference to new promises, includes an equitable obligation.
4. ———: ———: ———: ———: **Pleading.** Where a debt barred by the Statute of Limitations, is revived by a new promise in writing, in an action on such revived obligation the petition should allege the new promise to be in writing.

Petty v. Tucker.

5. ———: ———: ———: ———: ———: Filling New Promise:

Denial: Quaere. Where a debt barred by the Statute of Limitations, is revived by a new promise in writing, in an action on such debt, the petition is founded in part upon the new promise, and the writing should be filed with the petition, as required by statute in ordinary cases, so that the defendant, as provided by statute, may deny its execution under oath, if he so desires. *Quaere.*

6. ———: ———: ———: Demurrer. Where the petition discloses that an action is barred and does not state facts showing a valid new promise, a demurrer is a proper course of procedure.

Appeal from Linn Circuit Court.—*Hon. John P. Butler*, Judge.

AFFIRMED.

Frank P. Divelbiss and *Jas. L. Farris* for appellant.

J. M. Davis & Son for respondent.

ELLISON, J.—Plaintiff is the executor of the will of James P. Ward, deceased, and on the 19th of May, 1911, brought this action asking to be subrogated to the rights of Caldwell county in a note and mortgage given by James H. Tucker to said county for borrowed money. The petition alleges that on the 4th of February, 1889, Tucker borrowed \$250 of the school fund of said county and gave his note (with mortgage on his land to secure the same) whereby he promised to pay that sum on the 4th of February, 1890. That he failed to pay the note and on the 5th of August, 1895, it amounted, with interest, to the sum of \$412.50, and the said county was threatening to foreclose the mortgage for non-payment. That at that time defendant Tucker (who was deceased's nephew) was insane and confined in a state asylum, and that his mother (deceased's sister) was residing on the lands mortgaged

and dependent thereon for support, and requested deceased to pay the note due to the county so as to save the land from sale and thereby preserve it for defendant, if he should be restored to his right mind. That thereupon, on said 5th day of August, 1895, with the expectation of being subrogated to the rights of the county, he paid the county \$412.50, the full amount due on the note, and it, with the mortgage, was delivered to him, but by mistake there was an entry of satisfaction made on the margin of the record of the mortgage.

It is then alleged that defendant was afterwards restored to his right mind and released from the asylum and that he afterwards, in the year 1907, promised deceased to repay him the full amount so advanced for him, but failed to do so; and that after deceased's death defendant promised plaintiff, as executor, to pay such sum and has wholly failed to do so. The prayer of the petition is for judgment for the amount thus paid for defendant, and that plaintiff, as executor, be subrogated to and succeed to the rights of Caldwell county under the mortgage and that such mortgage be foreclosed, etc.

There was a demurrer to the petition on the ground that on its face it was disclosed that whatever cause of action plaintiff may have had was barred by the Statute of Limitations. And that the promise to pay after defendant was restored to his mind and health was not in writing, or by part payment. This demurrer was sustained and plaintiff has brought the case here.

We are not inclined to adopt defendant's theory that plaintiff's intestate was a mere volunteer in paying defendant's debt and therefore could not have a valid claim against defendant. Defendant was insane and the payment was made by the intestate for the purpose of protecting his home and thus preserving it to him in case he became of sound mind. It is true that

in thus coming to the relief of an insane man he did not make him a legal debtor—did not create a debt at law. But he did, by that act, originate an equitable claim to subrogation. If one pays a debt of an insane man, which is secured by a valid mortgage on his real estate, for the purpose of preserving such real estate, he can be subrogated to the rights of the mortgagee. [37 Cyc. 467, and note 66; 3 Pomeroy's Eq. Jur., sec. 1300.]

But all claims, legal or equitable, have a time limited for their assertion, and in this State it is well settled that the right of action accrues at the time the payment is made. [Burrus v. Cook, 215 Mo. 496; Singleton v. Townsend, 45 Mo. 379.] When a surety signs a note for a principal, there is said to be an implied promise on the part of the latter to pay the surety whatever he may have to pay by reason of his suretyship. And where there are several sureties, that there is an implied promise by each to pay the other whatever he may be compelled to pay for the principal over his proportion. These obligations are sometimes said not to arise from an implied promise, but that they come into existence upon equitable principles of justice and good conscience. [Furnold v. Bank, 44 Mo. 336, 338.] It is, however, clear that whatever may bring them into existence, they are *obligations* due from the principal in the one case and the cosurety in the other. Therefore, section 1889, Revised Statutes 1909, declaring that "actions upon contracts, obligations or liabilities, express or implied," shall be barred in five years, applies; and since the claim of plaintiff's intestate arose on the 5th of August, 1895, and this action was not brought until the 19th of May, 1911, it is barred by the statute just cited, unless saved by the subsequent promise of defendant made in 1907.

It is provided by section 1909 of the limitations statute, that, "In actions founded on any contract, no acknowledgment or promise hereafter made shall

be evidence of a new or continuing contract," unless it be made in writing. Plaintiff's position is that this section, by its terms, applies only to "contracts," and that since his cause of action does not arise upon, or out of, contract, but rather from equitable considerations of justice to which we have just referred, the statute requiring the promise to be in writing has no application and a verbal promise is therefore binding. Now whether the obligation of a person whose debt has been paid for him while he was insane, to save his estate, arises out of a contract (implied), or from equitable principles of justice, it is, at all events, an obligation and, as we have seen, it is barred in five years; and we think that the statute (sec. 1909), though using only the word "contract," means to include any obligation to which it has fixed a bar. That is to say, when the statute (sec. 1889) fixed a limitation of five years on an "obligation" to pay money, it meant by the word "contract," as used in section 1909, to require that there must be a written promise to revive such an obligation to pay money as exists in this case.

The facts stated in the petition showing the action to be barred, it became necessary to allege therein any matter of exception which would relieve the bar. In this case the promise subsequent to the bar not being a written promise, did not revive the obligation, and a demurrer was the proper remedy. [Burrus v. Cook, *supra*.]

But plaintiff claims that his general allegation of a promise will be interpreted to mean a legal promise and therefore he has, in legal intendment pleaded a promise in writing. Conceding plaintiff means that the promise charged is a written promise, yet, was it not necessary for him to allege it to be written?

If it appears that a cause of action would be barred by the Statute of Limitations but for a new promise, a new promise must be alleged, so that the pe-

tition may contain a statement of a valid and subsisting claim. Otherwise, it would be subject to demurrer. [Boyce v. Christy, 47 Mo. 70; Henoch v. Chaney, 61 Mo. 129; Burrus v. Cook, *supra*.] In recognition of this rule plaintiff alleged that after the period of five years from the date of his payment of defendant's debt and within five years of bringing the action, the latter promised to pay him. Sections 1909 and 1911, R. S. 1909, are applicable to the question. The former makes necessary to the validity of such promise that it be in writing. Plaintiff insists that from an allegation of a promise, merely, the law will assume a legal promise, that is, a promise in writing; and that is the view taken on questions involving the statute of frauds. [Phillips v. Hardenburg, 181 Mo. 463.] But no ruling in this state has been called to our attention where the promise was in avoidance of the Statute of Limitations. We think considerations arise as to the latter which do not apply to a plea of the Statute of Frauds.

While it has been decided in this state that the cause of action is upon the original promise, the new promise being merely a reviver of it (Carr v. Harlbut, 41 Mo. 264, 269), yet it is nevertheless necessary to allege the new promise, else, as we have seen, the petition is demurrable. In other words, notwithstanding the cause of action is on the original promise, it takes the new promise to complete or entirely make out the cause of action. Certainly the petition, in part at least, is "founded upon" the new promise. In such circumstances if a writing is depended upon, is, or is it not, necessary to allege that such new promise was written?

In all cases where "the petition is founded" upon an instrument of writing executed by the other party, the instrument must be filed with the petition. [Sec. 1844, R. S. 1909.] And by provision of section 1985 of the same statute, if the execution of such writ-

ing be not denied by answer, under oath, it shall be adjudged to be confessed. If we are correct in the statement that a petition which, in order to state a cause of action, *must* contain an allegation of a new promise, is, partly, "founded" on that promise, then it was necessary for plaintiff to have filed with his petition the paper containing the written promise. This, in justice to defendant, that he might see if he ever executed it, and to the end that he could determine whether to deny its execution under oath and thereby put plaintiff to the test of proving that he executed it, as provided by section 1985.

So far as concerns the necessity of a denial under oath, of the execution of written instruments, the statute of Kansas (Sec. 5703, R. S. 1909; Sec. 108, Code of 1868) is the same as ours; except that it applies to all instruments, while ours includes only those executed by the opposite party. And in the case of *Smith v. Beeler*, 48 Kan. 669, it was taken for granted, without discussion, that if the new promise was in writing, it was necessary to so allege; and it was ruled that unless the defendant denied its execution under oath, it would be taken as confessed. And in *2 Chitty on Pleading*, 436, the form for the plea is that it was in writing, "a copy whereof is hereto annexed."

These considerations would seem to demand that the petition allege the promise to be in writing.

But it is not necessary to put our decision on the above statutory ground, and we do not. There is another reason which we think requires the character of the promise to be alleged. And that is, that there are more than one kind of new promises which will relieve the bar of the statute, and therefore it is but fair to require the plaintiff to allege which one is meant. When there is but one legal kind, and a promise generally is alleged, as in cases involving the Statute of Frauds, it may be assumed that the legal one is intended; but where there are more than one, a mere

general allegation of a promise, leaves the defendant in doubt and confusion as to what is meant. If a person makes a part payment, recognizing the balance of the debt, though not evidenced by a writing, it is a new promise. [State ex rel. v. Allen, 132 Mo. App. 98, 112; Wesner v. Stein, 97 Pa. St. 322, 326.] In Barclay's Appeal, 64 Pa. St. 69, 72, it is said that "there can be no more unequivocal acknowledgment of a present existing debt, than a payment on account of it, and, according to all the authorities, this is all that is required to take a case out of the Statute of Limitations." In Egery v. Decrew, 53 Me. 392, it is said that "payment operates as a renewal of the promise and saves the case from the statute." Before the statute requiring a new promise (without payment) to be in writing, an acknowledgment, without payment, was "considered a new promise, for which the old debt is a sufficient consideration." [Moore v. Bank of Columbia, 6 Peters, 86, 92.] Even if part payment is made after the debt is barred, it will revive the promise. [Shannon v. Austin, 67 Mo. 485.]

Our statute has not changed this rule; for, notwithstanding section 1909 of the statute requires a new promise to be in writing, such requirement is qualified by section 1911, retaining the efficiency of a part payment; and such payment may be shown by parol. [Egery v. Decrew, *supra*; Wood on Limitations, sec. 111.] Formerly, a new or revival promise might be established by proof of verbal acknowledgment, unaccompanied by payment; or by a written acknowledgment; or by a part payment. On account of vexatious misunderstandings, temptation to perjury, etc., the statute (known as Lord Tenderton's Act) abolished the first mode by requiring the second, but retained the third.

So it is manifest, as we have said, that there are two different kinds of promises which will relieve the bar of the statute, and when plaintiff merely alleged a

promise, generally, he did not advise defendant on what it was he based his claim. If such pleading is sustained, it will put defendant to the necessity, with resulting trouble and expense, of preparing to meet each of the two modes of making a renewal promise. And this is no trivial matter. Besides unnecessary perturbation and doubt in which defendant is placed, he must be prepared to show that the writing, if that turns out to be what plaintiff meant by his general allegation, is a forgery, or is insufficient on its face, etc.; and he must likewise gather his witnesses and array the circumstances connected with the case, to show that he never made a payment (if that be plaintiff's meaning), or if he did, that it was not in such circumstances as amounted to a promise, etc.

A question quite like this was decided in *For-sythe v. Bristowe*, 8 Exch. (Welsby, Hurlstone & Gordon) 347. The reasons given for the decision appear in the observations made by the judges during the hearing. The plea of a new promise there appeared in the replication as an acknowledgment, generally, of the debt, within the period of limitation, and it was insisted that "it was not required to specify the particular mode of acknowledgment, but only to state generally that there was an acknowledgment within the prescribed period." But Parke, B. said, "There may be great expense in investigating part payment, and very little in proving an acknowledgment in writing; but the effect of this form of replication would be to cast upon the defendant the costs of that part on which he succeeded." Alderson, B. said, "It is a pleading so framed as to prejudice the fair trial of the action, because it embraces *three points, and compels the opposite party to come prepared to meet them all.*" (Italics ours.) Parke, B. again speaking, said, that the statute "provides three modes (we have seen that ours provides two) by which a specialty debt may be taken out of the operation of that statute; and it is a

prejudice to a defendant to be compelled to come prepared to meet three different matters, where perhaps the plaintiff intends to rely on one only."

In *Jesup v. Epping*, 66 Ga. 334, the court states the law as it is written by Judge Wagner in *Carr v. Hurlbut*, *supra*, that a new promise does not create a new liability, but revives the old one; yet the court said it was necessary to set forth the promise with some certainty. And in *Thornton v. Nichols*, 119 Ga. 50, 52, it is said the admission should be alleged to be written. [*Ruddell v. Folsom*, 14 Ark. 213, 217; *Bank v. Conway*, 13 Ark. 344.]

In every instance we have noticed in the reported cases where a written promise has been relied upon, it has been alleged to be in writing. It seems never to have occurred to the pleader to omit this important fact. [*Mastin v. Branham*, 86 Mo. 643; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90, 93; *Wells v. Hargrave*, 117 Mo. 563; *Chiles v. School District*, 103 Mo. App. 240.] And in both forms of petition given in 3 *Bates Pleading & Prac.* 2051, whether on the new promise or the original contract, the promise is stated to be in writing. So, the form for such pleading as given in 2 *Chitty on Pleading*, 436, is, "that within six years before the suing out of this writ the defendant executed a writing, a copy whereof is hereto annexed, by which he acknowledged said debt, and agreed to pay the same."

The foregoing views result in an affirmance of the judgment. All concur.

**BEN W. SMALL, Respondent, v. ERNEST
LOWREY, Appellant.****Kansas City Court of Appeals, May 27, 1912.**

1. **WITNESS: Civil Case: Secreting Witness: Contract: Public Policy.** It is unlawful both by statute and from principles of public policy, to induce or deter a person from appearing as a witness in a civil case, by secreting him or placing him beyond the jurisdiction of the court, and a contract for such service is void.
2. **——: Party to Cause: Minor: Secreting Release.** Where a release of a cause of action, upon which suit had been brought, had been obtained from a minor plaintiff, and it was feared such minor might appear at the next term of court to reject the release and prosecute the action, a contract made with defendant and another for the latter, to take the minor out of the state and secrete her until the case had been dismissed, is fraudulent and against public policy, and no recovery can be had for such services.
3. **——: Unlawful Service: Knowledge: Continued Service.** If one engaged to perform a service, not unlawful, but learns soon after entering upon the performance that it is unlawful, and yet continues to the end, it taints the entire transaction, and no action can be maintained for such service.
4. **——: ——: Release: Delivery: Compensation.** If one agrees to obtain and deliver a written release of a cause of action from one party to another, and he obtains the release but does not deliver it to the defendant employing him to get it, he cannot recover compensation.
5. **——: Quære: Inducing Party to a Cause.** Whether inducing a party to a cause, who is an adult, to keep in hiding so as not to be present when the case is called for trial, is a wrong for which no compensation can be recovered, *quære*.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

REVERSED.

Conkling, Rea & Sparrow, Craven & Moore and
L. H. Walters for appellant.

Ben T. Hardin and *W. W. Calvin* for respondent.

ELLISON, J.—Plaintiff's action is based on a contract with defendant whereby the latter was to pay him for certain services rendered as a detective. He recovered a judgment in the trial court.

It appears that defendant's father, James L. Lowrey, residing in Boone county, was accused of a criminal assault upon Fanny Sexton, a young girl in that county, under eighteen years of age. Defendant, a physician residing in Excelsior Springs, took an interest in his father's behalf and, as plaintiff alleges, engaged the latter's services, as a detective, to assist his father. Originally both defendant and his father were made parties, but the case was dismissed as to the latter. The petition is in two counts and purports to be based upon two contracts. The first, that defendant represented that Fanny Sexton had instituted a civil suit for damages in the circuit court of Boone county, and that he engaged plaintiff to effect a settlement and release of the case. That plaintiff did procure a written release from the girl, for which service defendant agreed to pay him \$450 and his expenses, on which latter item, amounting to \$66.40, there had been paid sixty-five dollars, leaving a total of \$451.40 still due.

The second count is for services in preventing this settlement from being set aside, and in preventing the action for damages mentioned in the first count, from being tried in the Boone county circuit court, by getting the girl out of the way, for which service defendant agreed to pay him ten dollars per day for two weeks; and that at the expiration of two weeks defendant engaged him to continue his service, in preventing the action from being tried by keeping the girl hidden, for which he was to pay him the reasonable value of his services, together with all expenses attending the service. That the service last mentioned continued for near three months, and was worth ten dollars per day, amounting to \$840; and that his ex-

penses were \$396.56, on which latter item there had been paid \$190.

It appears from the evidence that on September 28, 1909, the date plaintiff was employed to procure a settlement, no civil action had been instituted, and that there never has been. The action was a criminal charge set forth in an indictment for rape. But plaintiff claims not to have known this until about the first of November, 1909. At any rate, he procured a written release from the girl, for fifty dollars, about two weeks after his employment. He testified that defendant then informed him that he learned the girl was under eighteen years of age and that an attempt would be made to set the release aside and go on with the case. Wherefore it was thought best to take the girl away and secrete her until the case was called at the approaching term of court, when, if she were absent and her whereabouts unknown, it would necessarily be dismissed. That in pursuance of this desire, plaintiff agreed to get her out of the way, for which service he was to be paid ten dollars per pay and his expenses. He thereupon took her to the state of Kansas, where he paid her board and other expenses, as well as nine dollars per week as wages for agreeing to keep away.

It then developed that the case was not dismissed at the term it was expected to be, and plaintiff testified he was instructed to keep the girl secreted, and that he did so up to the 8th of January, 1910.

As stated above, no civil action had been brought by the girl, and the prosecution instituted in court was an indictment for rape. Plaintiff testified that he was misled; that he all along believed, as defendant had told him from the start, that it was a civil action, and he did not know there was a criminal prosecution. He, however, became aware on November 2, 1909, from statements in a letter, that it was a criminal case, and again, from a meeting with defendant on November 22, he again came in possession of facts from which he

said "he was thoroughly satisfied" that it was a criminal instead of a civil case. Then again, on the 22d of December, he says he went to Columbia and examined the record and found it to be a criminal prosecution for rape.

We will first take up the claim stated in the second count. The face of the entire record shows a fear on plaintiff's part that the nefarious work in which he was engaged might cause the courts to refuse him aid in securing compensation for such character of service; and he therefore advances the theory that he was deceived and did not know the real purpose sought to be accomplished through his employment. He seems to have assumed from the outset that if the case was a civil one, his acts would not be reprehensible in the eye of the law. In this we think he is mistaken. To wilfully engage, for hire, single handed or in combination with others, to thwart justice, whether civil or criminal, is not only against positive statutory law, but a contract to accomplish that purpose will be refused enforcement, on the ground of public policy. [Ridenbaugh v. Young, 145 Mo. 274; Sumner v. Summers, 54 Mo. 340; Sawyer v. Sanderson, 113 Mo. App. 1. c. 246; Tyler v. Larimore, 19 Mo. App. 445.] The statute (Sec. 4352, R. S. 1909) makes it criminal for anyone by bribery, menace or other means to induce any witness, or person who may be a competent witness, to absent himself, or withhold his evidence, or "deter or attempt to deter him from appearing or giving evidence in any cause, matter or proceeding, *civil* or criminal."

Doubtless it will be said that while the girl in this case, if not necessarily, would, naturally at least, be the chief witness, yet as she was a party to the action, the statute, properly interpreted, would not apply to the act of getting her out of the way. If we should concede this, it will still not leave plaintiff in a posi-

tion where he may rightly claim the assistance of the courts.

If he thought it was a civil action at the time of his original employment, and continued to think so at the time of his second employment, when he agreed to take her into another state and to prevent her appearance in court, he also knew that was desired, because she, being a minor, would be enabled to have her release of her cause of action against defendant's father set aside and thereby became enabled to obtain justice for a most greivous wrong, by the continued prosecution of her suit. Now it is plain that inducing a minor to leave the state so as to deprive him of the opportunity to receive the protection of the court before which he had an important case pending, and of asserting his rights by obtaining relief from the imposition of a pretended and fraudulent settlement, is a base and unlawful act which the courts will not countenance; and on account of public policy will refuse assistance to one engaged in such service. [2 Kent's Com. 466; 1 Story's Eq. Jur., sec. 296.] That was what plaintiff did, as stated in his own testimony. So his thinking (if he did think it) that he was doing service in a civil action instead of a criminal prosecution, does not affect his unlawful conduct. The cause is different, but the predicament in which he is left is the same.

But in truth, and his own testimony shows it, while yet engaged in the service he knew that the case was a criminal prosecution, and that the object was to secrete the girl beyond the jurisdiction of the court, in order to prevent the state from securing her as a witness. He entered upon what he calls his second service for defendant, some time after the middle of October and, as we have above stated, he learned the true character of the case on the 2nd of November, and again on the 22nd of that month, and himself himself inspected the records on the 22nd of Decem-

ber, and yet he continued in the unlawful service included in his claim until the 8th of January. So that, perhaps, five-sixths of the service which he testified was begun in innocence, was performed in guilt. By continuing in the performance of the unlawful service after knowledge of its character, he tainted the whole claim.

That he had knowledge of the character of the prosecution is further evidenced by an incident in Kansas City. He had a spirited interview in that place with one of the attorneys for the defense in the criminal case. He testified that defendant wrote him a letter from Chicago on the 3d of December stating he was starting to New York and that just after that he called upon this Kansas City attorney and made known that he had been deceived as to the character of the case on account of which he had spirited the girl away and was keeping her in hiding, and said to him that he was going to get out of the matter, that he had been misled and he wanted "the woman taken off his hands." The lawyer said, "you are guilty of an indictable offense, you are a candidate for the penitentiary, sir, and I will vote for you." And yet a part of his claim asked to be allowed, is for service performed *after that*.

The first count, as we have already seen, is for services in procuring the release of what plaintiff says he was misled by defendant into believing was a civil action in the Boone county circuit court. In our opinion the evidence, circumstances and situation all point to one conclusion and that was that plaintiff's employment from first to last was to get rid of the girl, and that the entire affair was forbidden by law and morals and that no cause of action can arise out of it. But, conceding we cannot declare this as a matter of law, so far as being applicable to and including the first count, we are satisfied that other considerations show

plaintiff without legal standing. The petition charges that plaintiff was employed to get a release from the girl, and that in pursuance of such employment he got it and that it was "accepted by defendant." It is, of course, important, in case of such nature, that the accused party should have possession of the release paper. It was of the greatest importance to his future protection and it was what plaintiff agreed he should have. Yet the evidence fails to show he ever produced the release. There is nothing except his word that he ever had one. But whether he did or not, defendant says he never employed him to get one and that none was ever delivered to him; and plaintiff himself testified that he had never delivered the release to defendant and that defendant had never seen it.

The record convinces us that plaintiff has no cause of action, and the judgment should be reversed. All concur.

JAMES W. NOEL et al., Appellants, v. LEES
SUMMIT, Respondent.

Kansas City Court of Appeals, May 27, 1912.

1. **PAVING: Repairs: Street Commissioner.** Substitution of the paving of the principal part of a street for its entire length, with new paving, is not a repair, and is not authorized under the statute as to cities of the fourth class, to be made informally by the street commissioner or an improvement committee.
2. ———: ———: ———: **Reconstruct: Statute.** The word "reconstruct" ordinarily means to rebuild, to construct anew. But its meaning may be modified in a statute for street paving by being so connected with the word "repair," as to show it to be synonymous with or limited in meaning to that of repair.
3. ———: ———: ———: **Taxbills.** A street more than one mile long, in a town of 1450 inhabitants, had been macada-

mized for fifteen years to a width of twenty feet at one part and thirty-two at another. It became worn away in the center and the improvement committee informally contracted the work of rebuilding it eight inches deep, to a width of fourteen feet at one part and twenty feet at the other, to a contractor who constructed it. *Held*, that this was not a repair as authorized by section 9411, Revised Statutes 1909, to be contracted for informally by the committee, and the taxbills issued against abutting property were invalid.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

REVERSED AND REMANDED (*with directions*).

Paxton & Rose for appellants.

(1) There is nothing in the claim that plaintiffs waived their rights by standing by and seeing the work done; jurisdictional matters, such as the preliminary resolution and an ordinance describing the work, cannot be waived. *Keane v. Klansman*, 21 Mo. App. 485; *Bank v. Western*, 68 Mo. App. 137; *Parkinson v. Houlan*, 182 Mo. 189. (2) The street and alley committee had no authority to do anything but fill holes made here and there in the street. It had no power to make a repaving under the guise of a repair. *Clay v. Mexico*, 92 Mo. App. 611. (3) The new work, although put down on the remains of the old macadam was macadamizing and repaving not a mere repair. *Jones v. Plumber*, 137 Mo. App. 337. (4) The new paving put down exceeded the thickness the remains of the old pavement on which it was placed, and therefore constituted a repaving, not a repair. *Rackliffe v. Duncan*, 130 Mo. App. 695.

E. S. Bennett, T. J. Haekler and Pence & Sanford for respondent.

(1) The street and alley committee did not need an ordinance from the board of aldermen to confer

authority, and if they did, the ordinance of April 6, 1911, was sufficient. Sec. 9411 R. S. 1909; *Fayette v. Rich*, 122 Mo. App. 145. (2) The work was repair work. *O'Meary v. Green*, 25 Mo. App. 198. (3) The work was not reconstruction, but repair. *Ritterskamp v. Stifel*, 59 Mo. App. 510; *Farrell v. Ramelkank*, 64 Mo. App. 425; *Perkinson v. Schnaake*, 108 Mo. App. 255; *Rackliffe v. Duncan*, 130 Mo. App. 695; *Jones v. Plummer*, 137 Mo. App. 337. (4) The work being repair work, the taxbills would have been void, had the city proceeded by resolution, ordinance and letting of contract. *Deming v. Const. Co.*, 154 Mo. App. 540. (5) The Legislature having conferred the authority on this committee, they were in the exercise thereof beyond the control of the court. *Marionville v. Henson*, 65 Mo. App. 397; *Skinker v. Heman*, 64 Mo. App. 441, 148 Mo. 349.

ELLISON, J.—Plaintiff seeks to cancel certain taxbills issued for repairing a street in Lees Summit, a town of the fourth class. The trial court refused his prayer and found for the defendants.

It appears that running through the town from north to south there is a street commonly called Douglas street, though in fact about one-fourth of its length is made up of Hearne avenue. The full length of the two, running as they do from the north to the south limits of the town, is near a mile and an eighth. These streets were macadamized in 1896, the Hearne avenue part twenty feet wide and the Douglas part thirty-two feet wide, both twelve inches deep. The street, thus paved, composed a part of a much traveled highway in going to and returning from places beyond, that attracted much of the public of the populous county of Jackson, in which Lees Summit is situated.

About fifteen years after this paving was completed it became so worn that the city council thought

it proper to repair it and passed the following ordinance for that purpose: "That the authority is hereby granted unto the street and alley committee of the board of aldermen of said city to proceed to repair the macadam along and upon Douglas street in said city, from the northern limits of said city to the southern limits of said city, proceeding therein as provided by section 9411, Revised Statutes of Missouri 1909."

The provision of section 9411, referred to in this ordinance, is as follows: "No formality whatever shall be required to authorize the repairing of sidewalks, or of street or other paving, curbing, guttering, macadamizing, or part thereof, or reconstructing the same, and making assessments therefor; but the proper officer or committee on improvements may, without notice, cause such work to be done, keeping an account of the cost thereof, and reporting the same to the board of aldermen for assessment; and each lot or piece of ground abutting on such sidewalk, street, avenue or alley, or part thereof, shall be liable for its part of the cost of such work made along or in front of such lot or piece of ground, as reported to the board of aldermen. The board of aldermen may provide a penalty for failure to pay such special tax within a given time, and any taxbills issued in payment of such repairs shall constitute a lien upon the property liable therefor until paid."

Where a street is to be paved in a town of the class to which Lees Summit belongs, the statute requires that a resolution be first adopted and published by the city council declaring the paving necessary, so that objections, if any, may be made and heard. Then an ordinance is passed providing certain specifications for material and the manner of the work and the time in which it is to be done. Then a public letting is had and a contract let to the best bidder, etc. But in the matter of repair of a street, these formalities and safeguards to the interests of the propertyowner are dis

pensed with and there seems to be delegated to "the proper officer or committee on improvements," in this case the street and alley committee, authority, without formality or notice or other protection to the property-holder, of his, or its own motion, to make a contract and cause repairs to be made and to report the cost to the board of aldermen for assessment, the board issuing taxbills to the contractor. It will be noticed that this statute in connection with "repair" uses the word "reconstruct," and plaintiff has said that used in such connection it is synonymous with "repair." Whether so or not we need not say, since this proceeding from beginning to end is for the "repair" of the street. So the question for the court is, can the improvement in question be properly or fairly designated a repair of the street? The contest, as appeared from statements in argument, determines whether the abutting property or the town at large must pay for the work.

The evidence shows that in the central part of the street the macadam had been worn and wasted away by long usage, to within from two to six inches of the ground; and that it was relaid to the width of fourteen feet on the Hearne avenue part and twenty feet on the remainder, and of a depth of eight inches. The boundaries of the work were marked on each side by a plow, and when completed presented an even and uniform appearance the entire length, as though a new or repaved street. The cost of the work apportioned to the abutting property was \$4025.90, and the time occupied in doing it was two months and ten days. Within the rules stated by the St. Louis Court of Appeals, in *Jones v. Plummer*, 137 Mo. App. 337, *Ritterskamp v. Stifel*, 59 Mo. App. 510, and *Farrell v. Rammelkamp*, 64 Mo. App. 425, and of this court in *Rackliffe v. Duncan*, 130 Mo. App. 695, the improvement was not repair work.

We have a right to take notice that Lees Summit is a town of 1455 inhabitants, and it must strike one with some surprise that a single improvement or job of work, on one street, in a town of that size, costing \$4025.90 and taking more than two months to perform, should be called a "repair." We concede that those things should not control a determination of the question, yet they naturally and properly are to be considered in coming to a conclusion. An answer to the question, what is repair, is difficult to state; perhaps a definition which, in all cases, would precisely determine what it is, could not be formulated. We can, however, with safety, state some element necessary to constitute repair; it must have an original upon which to rest. And though there may have been an original structure, the substitution of another like it at the same place, would not be a repair. Defendant cites us to *O'Meara v. Green*, 25 Mo. App. 198, to show what repair of a street is, but by reference to the same case, reported in 16 Mo. App. 118, we find the work there was "a little top dressing of sand and gravel and rolling it." We do not believe that the substitution of the chief part of a structure, as in this case, ought to be called repairing it. Nor do we believe the Legislature intended to give to a single minor town officer or committee, so important a power as that he may, in his own discretion, substantially rebuild at private contract an entire street, through the length of the municipality. That was what was done in this case. Defendant calls it a repair of the *center* of the street. In fact it was all the used part of the street and all of the paved portion except the outer edges, three feet on one part and six feet on the other, parts likely to remain unused and unworn. It was a repaving, in a certain width, of the entire street. There was no variation in the work, but an arbitrary width limit was established by lines marked out.

Although the entire proceeding was had under the authority to repair, and though counsel insist that the work was repair, yet they seem to desire whatever protection the word "reconstructing," as used in the statute, may give. The word "reconstruct," like most others, may have a different meaning in different connection, or as limited by express words. As written in this statute, we think it was evidently not used in its ordinary comprehensive sense, as is shown on the face thereof. We think it was used more in the restricted sense and as somewhat synonymous with the word "repairing," already used. For, further on, in authorizing taxbills and referring to them as issued in payment of the improvement, it reads "any taxbills issued in payment of such *repairs* shall constitute a lien," etc.; thus not making any distinction between repair and reconstruction work. To reconstruct ordinarily means to rebuild, to construct again (*Farraher v. City of Keokuk*, 111 Ia. 310; *Contas v. Bradford*, 206 Pa. 291, 295), and if we allow that meaning to the statute we would have the safeguards thrown around public work confined to its *original* construction; that is, that a street once paved, though worn out or otherwise destroyed, might be replaced continuously at the instance of a street commissioner, regardless of the wish of the property owners and without any means for their protection. The manifest reason for allowing street repairs and reconstruction made at the instance of the street commissioner, without the usual formality requisite to street paving, is that the nature of such work and the requirement therefor becomes apparent at irregular times and in comparatively small ways, both in extent and cost. It was more practical to leave such matters of keeping the street in condition, to a street commissioner, as the necessity would show itself from time to time. It was never intended that he should construct a new work. It would be an unreasonable construction of the statute

to say that the first part showed such solicitude for the protection of the property holder as to require action of the board of aldermen, publication of notices, right of remonstrance, estimates, plans and specifications, and a public letting of the work, and then that it should be immediately followed, in the latter part, by words doing away with all this when the street was to be rebuilt or again be constructed.

The judgment is reversed and the cause remanded, with directions to enter judgment for the plaintiffs. All concur.

**WILLIAM DUKE, Respondent, v. METROPOLITAN
STREET RAILWAY COMPANY, Appellant.**

Kansas City Court of Appeals, May 27, 1912.

1. **NEGLIGENCE: Transfer Privileges: Ordinance.** An ordinance requiring a street car company to furnish transfers that will enable passengers to go by a reasonably direct route to their destinations does not deprive the company of its right as a common carrier to make reasonable rules controlling the use of transfer privileges.
2. **——: Transfers: Duty of Passengers.** It is the duty of a street railway to prescribe reasonable rules for the use of transfers and when passengers receive transfers they must inform themselves of the manner in which they can be used. If they make a mistake, not induced by the agents of the company, they have no remedy.

**Appeal from Jackson Circuit Court.—Hon. O. A.
Lucas, Judge.**

REVERSED AND REMANDED.

John H. Lucas and Charles N. Sadler for appellant.

Ellison A. Neel and A. P. Newell for respondent.

JOHNSON, J.—This is a suit to recover actual and punitive damages for the alleged wrongful ejection of plaintiff from an electric street car operated by defendant. The jury decided the issues submitted to them in favor of plaintiff and in their verdict awarded him compensatory damages in the sum of \$300. After the overruling of its motions for a new trial and in arrest of judgment defendant brought the case here by appeal.

Plaintiff, an old man, boarded a northbound car on defendant's Rosedale line at Thirteenth street and Southwest boulevard intending to travel to a point in Kansas City, Kansas. His destination was on another line of defendant's street railway system called the Fifth street line and it was necessary for him to transfer to a westbound Fifth street car in order to complete his journey. He paid the fare of five cents to the conductor of the Rosedale car and received a transfer check which, if properly used, entitled him to go to his destination without payment of another fare. The car on which he became a passenger turned into Wyndotte street and ran north on that street to and beyond Fifth street. At Twelfth street it crossed an east and west line operated by defendant and this crossing was one of defendant's transfer points. At Fifth street it crossed the Fifth street line and that crossing was a transfer point for passengers westbound on Fifth street to points in Kansas City, Kansas. If plaintiff had remained in the Rosedale car until he arrived at Fifth street he could have changed to a westbound Fifth street car at that place and proceeded to his destination without further change of cars. Instead of following this, the most direct route, he left the Rosedale car at Twelfth street and boarding an eastbound car on that street, rode two blocks to Main street. He handed his transfer check to the conductor of the Twelfth street car and told him, so he says, that he desired to use the check for trans-

portation on a Main street car. The conductor punched the check and returned it to plaintiff who left the car at Main street and boarded a Fifth street car at that place which was a regular transfer point. The conductor of the Fifth street car refused to accept the transfer check claiming it could not be used in the manner of its attempted use and demanded another fare. Plaintiff asked time to consider the demand and the conductor did not make a peremptory demand until the car had run about four blocks. Plaintiff did not pay the extra fare and the conductor seized him and forcibly ejected him from the car. The evidence of plaintiff tends to show that the conductor employed greater force and violence than that required by the resistance of plaintiff which was entirely passive, while the evidence of defendant tends to show that the conductor acted with moderation and accomplished the expulsion without physical injury to plaintiff.

Over the objection of defendant the court permitted plaintiff to introduce in evidence an ordinance of Kansas City which embodies what is popularly called the "Peace Agreement" between the city and the defendant railway company. This ordinance provides for universal transfers over all the street railway lines of defendant in Kansas City, Missouri, Kansas City, Kansas, Rosedale and Argentine, by which is meant that a passenger may ride from a point on any of defendant's lines to a point on any other line on payment of a single fare of five cents. The ordinance recites that it is "the intention of this contract that transfers shall be furnished that will enable a passenger to go by a reasonably direct route to his destination at any point on the company's lines for a single fare." It contains a provision to prevent a passenger from "making a loop" on a single fare but that provision is not material to our inquiry since it is obvious that plaintiff was not within the purview of

that restriction. A further provision of the ordinance is that "the city specially reserves to itself the right and power by reasonable ordinance to regulate the matter of transfers so as to carry out the spirit of this section." It is not shown that any ordinance was enacted regulating the matter of transfers from the Rosedale northbound cars to the Fifth street westbound cars and there is nothing in the ordinance from which we have quoted that forbids defendant from prescribing reasonable rules governing the use of such transfers. The transfer check issued to plaintiff was not produced at the trial. There is evidence to the effect that rules of defendant regulatory of the use of transfer privileges were printed on the back of transfer checks and that such rules made the check held by plaintiff good for transportation over the Fifth street line where the passenger boarded a car of that line at the intersection of Fifth and Wyandotte streets. Defendant offered evidence to prove that its rules made that transfer point the only one at which passengers might transfer from the Rosedale to the Fifth street cars, but the court sustained plaintiff's objections to the evidence.

The two grounds on which plaintiff contends he is entitled to recover are, first, that he was a passenger on the Fifth street car and therefore, that his ejection therefrom was wrongful and, second, that if he were not a passenger, the unnecessary force and violence of the conductor in putting him off affords him a cause of action for the resultant injuries he sustained.

In the instructions given the jury at the request of plaintiff, as well as in his rulings on the evidence, the learned trial judge proceeded on the theory that the test of whether or not plaintiff was a passenger was not his compliance or non-compliance with a reasonable rule of defendant regulating the use of the transfer check, but depended on the solution of the

question, which was treated by the court as an issue of fact, or whether "plaintiff was going by a reasonably direct route to his destination and was not making what is commonly called "a loop." In other words the jury decided the case on the hypothesis given them by the court that as long as a passenger is traveling to his destination by a reasonably direct route he may select his own course and that in this case the jury were entitled to draw the conclusion from the evidence as one of fact that the course selected was reasonably direct.

We think this hypothesis unsound. The "Peace Ordinance" in requiring that "transfers shall be furnished that will enable a passenger to go by a reasonably direct route to his destination" did not attempt to deprive defendant of its right as a common carrier to make reasonable rules controlling the use of transfer privileges. It only endeavored to compel the carrier to prescribe reasonable and not arbitrary or oppressive rules. It was only declaratory of well-settled rules of substantive law which would compel defendant to perform its agreement to give transfers that could be used by passengers in a reasonably convenient and expeditious manner. Without this regulatory clause of the ordinance, still the law would not allow defendant to perform its agreement to give "universal transfers" in a manner that would defeat or leave unsatisfied the obvious purpose of the agreement. In other words it would not allow defendant to prescribe rules that would compel transferring passengers to go by a circuitous and tedious route when it could take them to their destinations by a direct route. It was not only the right of defendant but its duty to prescribe reasonable rules for the use of transfers, and it was the duty of plaintiff when he became a passenger and received the transfer check to inform himself of the manner in which it could be used. "It is the duty of a person about to take passage to inquire when,

where and how he can go, or stop, according to the regulations, and if he makes a mistake, not induced by the agent of the company, he has no remedy." [Logan v. Railroad, 77 Mo. 663.]

This rule applies to street railways as does the further rule that a railway company must prescribe rules for the conduct of its highly complex business. The proper service, as well as the safety of the public, demands an intelligent and detailed systematizing of the business and passengers must comply with such rules as long as they are reasonable. Further we quote from the opinion in the Logan case:

"A railroad operated at random, without fixed rules and regulations to be observed in its management, would be a nuisance and a terror to the country through which it might pass. The probability that innumerable accidents and injuries would result from such a reckless mode of moving trains, requires the adoption and strict enforcement of reasonable regulations for their operation and management. A departure from such rules and regulations which should occasion an injury to a passenger who is presumed to take passage with reference to them, would render the company liable to such passenger in damages; and this liability cannot co-exist with the right of a passenger to have the train stop at a station at which, by the regulations of the company, such train is not permitted to stop. The court erred in refusing to permit the defendant to prove the rules and regulations of the company and the information given to plaintiff by the ticket agent when plaintiff purchased his ticket."

It was error in the present case to refuse the offer of defendant to prove its rules showing that the transfer point at Fifth and Wyandotte streets was the only point at which passengers were allowed to transfer from the Rosedale to the Fifth street cars. But there is enough in the record to show indisputably that such

was the rule and that plaintiff had but to read the back of his transfer check to know that defendant did not purpose to carry him on that transfer by any other route than that designated. His conduct was a defiance of a reasonable rule. He selected a circuitous course that required two changes of cars when he was offered a straight course with but one change. But whether his course was direct or devious is immaterial. He was offered a direct course and that was all defendant was required to offer him. The question at issue is not whether he selected a reasonably direct route, but whether he traveled by a reasonably direct and convenient route provided by the rules of defendant. There is no pretense that he did and we hold, as a matter of law that his transfer did not entitle him to ride on the car at the place of his expulsion.

The only issue on which plaintiff may go to the jury is that greater force was used in his ejection than was required by his passive opposition. Defendant argues that the petition does not sufficiently plead a cause founded on such tort. The objection would be good on demurrer to the petition, and we suggest to counsel for plaintiff that they amend the petition to state a good cause of action.

What we have said properly disposes of the case and we shall not discuss other points argued in the briefs. The judgment is reversed and the cause remanded.

All concur.

DIAMOND RUBBER COMPANY, Appellant, v.
O. H. L. WERNICKE, Respondent.

Kansas City Court of Appeals, May 27, 1912.

1. **NONSUIT: Voluntary: Demurrer to Evidence.** Where the defendant, at the close of plaintiffs evidence, asks an instruction in the nature of a demurrer to the evidence and the court announces an intention to give the instruction, a nonsuit, taken before the ruling is made and exceptions saved thereto, is voluntary.
2. —: **Voluntary and Involuntary.** A voluntary nonsuit is where the suit is terminated by the voluntary action and free will of the plaintiff while an involuntary nonsuit is when the plaintiff by some adverse ruling of the court which precludes a recovery is compelled to take a nonsuit.
3. —: **Voluntary: Judgment Final: No Appeal.** Where the nonsuit is voluntary the judgment is final and not open to review in the appellate court.

Appeal from Jackson Circuit Court.—*Hon. Kimbrough Stone*, Special Judge.

AFFIRMED.

Marley & Grover for appellant.

Harkless Cryslar & Histed and *Hogsett & Boyle* for respondent.

JOHNSON, J.—Action on an alleged written guaranty. Issues were raised by the pleadings and there was a trial before a jury. At the conclusion of plaintiff's evidence defendant offered the following demurrer: "Now comes defendant at the close of all of plaintiff's evidence and demurs to same for the reason that under the law and the evidence plaintiff is not entitled to recover."

The record shows that the court was "about to sustain said demurrer" when plaintiff took a nonsuit

with leave to move to set the same aside. It is conceded the court did not formally rule on the demurrer. In due time plaintiff filed a motion to set aside the nonsuit. The motion was overruled and plaintiff appealed.

At the outset we are called on to decide whether the nonsuit was voluntary or involuntary. If voluntary as counsel for defendant contend the judgment is final and is not open to review in the appellate court. "A voluntary nonsuit is where the suit is terminated by the voluntary action and freewill of the plaintiff while an involuntary nonsuit is when the plaintiff by some adverse ruling of the court which precludes his recovery is compelled to take a nonsuit." [Williams v. Finks, 156 Mo. 597; Layton v. Riney, 33 Mo. 87; Hageman v. Moreland, 33 Mo. 86; Poe v. Dominic, 46 Mo. 113; State ex rel. v. Gaddy, 83 Mo. 138; Mfg Co. v. Baker, 137 Mo. App. 670.]

A nonsuit will be deemed involuntary only when it is prompted by an adverse ruling of the court which is preclusive of a recovery by plaintiff. Until there is an actual ruling which puts a complete stop to any further progress on the part of the plaintiff he must keep going despite adverse rulings. It is held in a number of cases that where at the close of plaintiff's evidence the defendant asks an instruction in the nature of a demurrer to the evidence and the court announces an intention to give the instruction, a nonsuit taken before the ruling is made and exceptions saved thereto is voluntary. [Bank v. Gray, 146 Mo. 568; McClure v. Campbell, 148 Mo. 96; Lewis v. Mining Co., 199 Mo. 463; Carter v. O'Neill, 102 Mo. App. 391; Graham v. Parsons, 88 Mo. App. 385; Lucas v. Huff, 92 Mo. App. 369; Saddlery Co. v. Bullock, 86 Mo. App. 89; Adamson v. Railway, 126 Mo. App. 127.]

In their reply brief counsel for plaintiff concede this to be the rule but declare that the court did not have before it a peremptory instruction to the jury directing a verdict for defendant but had a common law demurrer to the evidence, and that since the effect of the giving of such demurrer would have been to withdraw the case from the jury instead of directing a verdict for the defendant, plaintiff could not have taken a nonsuit voluntarily or involuntarily after the demurrer was sustained but was compelled to act before the formal ruling was made.

The common law demurrer to the evidence did have the effect of a conclusive admission by the defendant not only of the facts brought out in the evidence of plaintiff but of the reasonable inferences to be drawn from them in favor of the pleaded cause of action and, further, it had the effect of entirely withdrawing the case from the jury and putting it before the court as in the case of a special verdict. In other words the offering of a demurrer which, by the way plaintiff was required to join in (*Tidd's Practice*, 865) was a submission of the case to the court for pronouncement of the sentence of the law on an admitted state of facts. [*Railroad v. McArthur*, 43 Miss. 185; *Suydam v. Williams*, 20 How. (U. S.) 436; *Nelson v. Whitfield*, 82 N. C. 54; *Pharr v. Bachelor*, 3 Ala. 237; *Eberstadt v. State*, 92 Texas, 97.]

But, as is said by the Supreme Court of the United States in *Suydam v. Williams*, *supra*, the common law demurrer to the evidence long since has fallen into disuse and in this state, at least, we must regard it as obsolete. Though the written request of defendant was not in the form of an instruction to the jury, neither was it in the form of a technical common law demurrer and its function was not to withdraw the case from the jury but merely to raise the question of the sufficiency of plaintiff's evidence to present an issue of fact. Had the court overruled it the trial to

the jury would and should have been resumed and defendant allowed to offer his evidence as in cases where the request for a peremptory instruction is refused. Regarding the request as in substance an instruction in the nature of a demurrer to the evidence, plaintiff was premature in taking a nonsuit before the instruction was sustained and exception saved, and the nonsuit must be held to have been voluntary.

The judgment is affirmed. All concur.

SAMUEL E. TAYLOR, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 27, 1912.

1. **STREET RAILWAYS: Fire Wagon: Street Car Track: Ordinance.** Plaintiff was a fireman on a fire wagon forty-five feet long and in making the run to a fire had to turn from one street into another, which made it necessary that he stop the wagon across a street railway track. There was a city ordinance requiring street cars to stop when a fire wagon was approaching, and giving such wagon paramount right of way. It was held that though the fireman saw defendant's street car approaching he had a right to assume that it would stop; and that if when the car got close enough to be a warning to him that it would not stop, he had no opportunity to save himself by jumping off the wagon, he could recover damages for his injuries resulting from the collision.
2. ———: ———: ———: **Custom Pleading.** If an ordinance of a city gives right of way to a fire wagon running to a fire, and requires a street car to stop when a wagon approaches, it is not error to permit evidence that the street cars did customarily stop, though there was no custom pleaded, since such evidence was only proving obedience to the ordinance.
3. ———: **Expert Evidence: Cars on Line: Identical Car.** Expert evidence of the distance in which street cars which run on a certain line could be stopped at a certain place when going at a given speed, may be given without confining the question to the identical car which had caused the injury.

4. —: Damages: Instruction: Reasonably Likely. It is not error in an instruction on the measure of damages to use the word "likely" instead of "certain," the instruction reading that plaintiff should be allowed damages for such future pain and suffering "as he is reasonably likely to suffer."

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

AFFIRMED.

John H. Lucas and Piatt & Marks for appellant.

(a) Plaintiff's statement that seeing the approaching car he drove on the track, there sat, watched and waited for it to run up and hit him, at all times knowing he could avoid a collision, must reverse this case. *Getty v. Transit Co.*, 103 Mo. App. 564; *Hawkins v. Railroad*, 135 Mo. App. 524; *Guinney v. Railroad*, 167 Mo. 595; *Ries v. Transit Co.*, 179 Mo. 1; *McGarth v. Transit Co.*, 197 Mo. 97; *Moore v. Transit Co.*, 176 Mo. 528; *Laun v. Railroad*, 216 Mo. 563. (b) The statement of plaintiff's eye-witnesses that the car and truck both on the run came in view of each other only when they passed the corner building and neither stopped until the collision, must reverse this case. *Markowitz v. Railroad*, 186 Mo. 350; *Dean v. Transit Co.*, 192 Mo. 584; *Kinlen v. Railroad*, 216 Mo. 158; *Holland v. Railroad*, 210 Mo. 350; *Schmidt v. Railroad*, 191 Mo. 215; *Gabriel v. Railroad*, 130 Mo. App. 657; *Hudson v. Railroad*, 101 Mo. 13.

I. B. Kimbrell and F. W. Gifford for respondent.

ELLISON, J.—Plaintiff was a fireman in the employ of the Kansas City fire department, and defendant is the operator of a street railway in that city. Plaintiff was injured by being struck by one of defendant's cars, and brought this action for damages. He recovered judgment in the circuit court.

Defendant's tracks run east and west on Eighteenth street and pass Agnes avenue, which runs north and south intersecting Eighteenth street. Each street is narrow, being about forty-five feet in width. It seems there is a "jog" of about forty feet where the avenue intersects with the street, and in order to continue on down the avenue you must make a turn into the street for the distance of forty feet to an entrance again into the avenue. A fire alarm was sounded, when plaintiff and a driver got upon the hook and ladder wagon which was about forty-five feet long, and started the horses rapidly down the avenue approaching Eighteenth street. On account of this "jog" in the streets, it became necessary to turn into Eighteenth street instead of crossing it at right angles, and then again into the avenue. To do this in the narrow streets with a fire wagon forty-five feet long, was a somewhat difficult performance, which the fireman call a maneuver in the shape of the letter "S." As plaintiff approached, he saw a butcher waving his white apron, as plaintiff supposed warning a car of the approach of a fire wagon. The wagon gong was sounded when plaintiff himself saw the car perhaps 180 feet away. The wagon was brought practically to a standstill on the railway track, waiting for the car to stop so they could make the proper turn. The car was then one hundred feet away. Plaintiff's seat on the wagon was seven feet from the ground. A city ordinance pleaded by plaintiff gave fire wagons and apparatus paramount right of way over the streets in going to a fire, and also made it the duty of all street employees in charge of a street car to stop the car when any fire wagon approaches, until it has passed by. Plaintiff, though seeing the approaching car that distance away, supposed it would stop as by observance of the law car operators always had. He continued to think it would stop until it was close enough (15 or

20 feet) for him to realize it would not, when he called profanely to the motorman why he did not stop. It was then too late for him to save himself by jumping from the wagon. He said the only place he could have jumped would have been on the track in front of the car. The car struck the wagon at the front wheels, which threw him off and inflicted the injury of which he complains.

The first objection to the judgment, that plaintiff sat on the wagon seeing the car and "watched and waited for it to run up and hit him," is put much too strong for the facts as stated by the plaintiff. He did sit on the wagon and saw the car coming, but not to "hit him," for he all the time supposed it would stop, and when he saw no movement made to stop, he called to the motorman. It was then too late for him to jump from his high seat; he stated his only place to jump would have been on the track in front of the car.

The natural question follows, why did he suppose the car would stop? We think a good reason was shown. He, his fellow firemen and his great wagon of forty-five feet length, were in plain view, and it is common knowledge that fire wagons have paramount right of way, which every one concedes. When one is known to be approaching, footmen scurry to safety, vehicles get to one side and street cars stop. But in this case an ordinance was pleaded and proved requiring street cars to stop; and it was shown in evidence that they customarily did stop. Defendant objects to the right to show a custom when it was not pleaded. Custom, like many other words, may vary in its meaning with the connection in which it is used. In this instance, proving that cars customarily stopped, or that it was their custom to stop, was merely proving their general observance of the ordinance and thus showing that plaintiff not only had a right to rely upon the ordinance and that it would be obeyed, but that it had actually always been obeyed. This was

all proper enough to show that plaintiff did not invite defendant's servants to run over him and explains why plaintiff was upon the track. It tended to take out of the case defendant's insistence that plaintiff could not recover on the last chance rule, or under any rule, because he willfully took position on the track and deliberately waited for defendant to "hit him." In this view the case did not depend upon a custom; or upon an ordinance; nor does the petition found the right of action upon an ordinance. The ordinance was pleaded we assume, merely to permit proof in explanation of plaintiff's conduct. And it seems to be justified, for defendant continuously insists that plaintiff wilfully invited and waited for the collision. We think no error was committed.

Objection, we think too critical, is made to the hypothetical question as to the distance in which a car could have been stopped, going at the rate of ten miles an hour, as the one in controversy was. We do not think there was any valid objection pointed out, when the matter is viewed from a practical standpoint. The witness was familiar with the grade and he was asked in what distance the cars which were run on that line, running at the rate of ten miles an hour, could be stopped. We judge from the objection that the question should have been made to apply only to the particular car which struck the wagon. If so, it would be rare that evidence of this nature could be produced for a plaintiff in cases of collision with cars. If there was any peculiarity about this car from those in general use on that line, defendant could have made it the basis for cross-examination, or evidence in its own behalf.

The next objection relates to instruction No. 1, in that it calls special attention to particular portions of the evidence in plaintiff's behalf. We think it does not do so in the sense complained of. It merely submits the hypothesis of facts upon which plaintiff's

case is based. It is a part of the basis of his case that he was a fireman in performance of his duty to the city, and when struck he was in the position made necessary by those duties.

It is then claimed that the instruction conflicts with defendant's on the matter of contributory negligence. But we find the instruction is right and whatever of wrong there was is found in defendant's instructions three and nine. Giving them was error in defendant's interest and, of course, it cannot complain.

Complaint is made of an instruction on the measure of damages limiting the damages to pain and suffering already endured "and such as he is reasonably *likely* to suffer therefrom in the future." Defendant insists the word "certain" should have been used instead of "likely." We think the objection has no substantial merit. [Illinois Cent. Ry. v. Davidson, 76 Fed. Rep. 517; Scott Twp. v. Montgomery, 95 Pa. St. 444; Curtis v. Railroad, 20 Barb. 282.]

In Devoy v. St. Louis Transit Co., 192 Mo. 197, an instruction using the words "reasonable probability" was approved, and so is that expression justified by the remark of Judge VALLIANT in Reynolds v. Transit Co., 189 Mo. 408, 422.

The last objection is that the verdict of \$1500 was excessive. We have examined the evidence in connection with defendant's suggestion, and find the amount justified.

The verdict being for plaintiff, we must assume the evidence in his behalf to be the facts in the case, and in that view defendant has no standing in this appeal. Here was a large unwieldy fire wagon on the track, and defendant's car bearing down upon it, with every opportunity to stop, and did not do so. If the facts are as the evidence for plaintiff tends to show them, the conduct of defendant's servants in charge of the car was without excuse.

The judgment is affirmed. All concur.

J. L. CUNNINGHAM, Respondent, v. H. C.
ATTERBURY, Appellant.

Kansas City Court of Appeals, May 27, 1912.

1. **REPLEVIN: Contracts: Evidence: Interlineation.** Where it is shown in an action to replevin a house built by a tenant on a farm under an agreement with the owner to permit its removal when possession of the farm was surrendered, that when the farm was subsequently sold and the owner desired to give the purchaser possession, it was agreed that the tenant was to give possession upon the return to him of a certain note and the payment of a specific amount, and that said note was returned and the money paid and a receipt containing said agreement signed by the tenant and delivered, the tenant is not entitled to recover, notwithstanding he, subsequently to the execution and delivery, made interlineations in the receipt by which he reserved to himself the house.
2. **CONTRACTS: FRAUD.** Parties to a contract are presumed to know what the contract contains and where they stand on an equality, are bound by its terms, in the absence of fraud.

Appeal from Linn Circuit Court.—*Hon. Fred Lamb,*
Judge.

REVERSED AND REMANDED.

A. W. Mullins and O. F. Libby for appellant.

J. A. Collet and Bresnahan & West for respondent.

BROADDUS, P. J.—Replevin for a house. In the year 1907, and for several subsequent years, Simon Schreiber owned a farm in Chariton county, during which time the plaintiff, by the permission of Schreiber, erected a small house on the farm for his use and benefit while he occupied and cultivated the land. This house was to be and remain the plaintiff's property with the privilege to remove the same. By an arrangement between Schreiber and the plaintiff, the

latter put in about ninety acres of the farm in wheat in the fall of 1910. Schreiber furnished \$100 to buy the seed wheat to be sown. The agreement being that the wheat to be raised was to be divided equally between the two, the plaintiff to do all the work and incur all the expense in putting in and harvesting the crop.

On December 12, 1910, Schreiber sold the land in question to the defendant Atterbury, and was to give him possession of the same in the March following. The plaintiff refused to surrender his possession, claiming that he had the right to such possession for the year 1911. There were futile efforts made between plaintiff and Schreiber to compromise their dispute as to the right of plaintiff to the possession of the land, and incidentally other matters. Afterwards, the defendant agreed with Schreiber that he might lease the farm to plaintiff for the year 1911, and that he would accept such lease in lieu of possession.

Schreiber, who lived in another state, came to Mendon on the 27th of February, 1911, and undertook to make a settlement with plaintiff. In the negotiations Schreiber offered, in the presence of defendant, to lease the farm to plaintiff for the year commencing March 1, 1911. This offer plaintiff refused on the ground that he had all the lease he wanted. However, plaintiff and Schreiber finally agreed on a settlement, but it is a matter of dispute as to some of its terms. One witness testified that plaintiff said to Schreiber, "you give me \$375 and my note and I will give you possession of everything," or as testified to by defendant, plaintiff said: "I have just one proposition to make and I am going to quit. I will take \$375 and you turn over my note and I will release everything and turn the farm over to you, everything on the farm and quit." Schreiber concluded to accept plaintiff's proposition and directed Mr. Stewart, a banker who was present, to close up the business with plaintiff

and pay him the \$375 and take a receipt. In writing the receipt Mr. Stewart omitted to mention the note. Plaintiff called attention to the omission and said he would not sign the receipt without his note. Stewart got it from Schreiber, who was not just present at that time, and turned it over to plaintiff, who thereupon put it into his pocket and signed the receipt. Mr. Stewart picked it up and placed it on the counter inside of the railing of the bank. Shortly after, plaintiff asked Stewart to let him see the receipt. After getting it back he took out of his pocket a fountain pen and said: "I don't know that it will be legal, but I am going to take a shot at it," and thereupon he inserted these words, "except right to remove belongings and harvest wheat now on premises." The credit was given to plaintiff for the \$375 in the bank, but the deposit slip was not delivered to plaintiff until after he had made the interlineation.

Plaintiff's evidence is somewhat different. He testified that there was no agreement that he was to release his claim on the wheat or the house. It is to be fairly inferred from what he testified to that he signed the receipt and made the interlineation mentioned afterwards. And it stands practically admitted that plaintiff handed the receipt to Stewart after he had signed it, and that he then asked permission to see it, whereupon Stewart handed it back to him and he then made the interlineation with a fountain pen that he took out of his pocket. He testified that Victor Boring then took the receipt outside to Schreiber and returned with the statement that it was all right.

Defendant offered to prove that when the receipt was presented to Schreiber with the interlineation that he repudiated it. Upon the objection of plaintiff the offer was refused.

There was other evidence pro and con, but we believe we have stated sufficient for a proper understanding of the questions at issue on the appeal. The

finding and judgment were for plaintiff and defendant appealed.

Among the assignment of errors is the action of the court in refusing to instruct the jury as requested by defendant in his instruction No. 3, which reads as follows: "If the jury believe and find from the evidence that on the 27th day of February, 1911, the plaintiff J. L. Cunningham, and Simon Schreiber made and entered into a settlement whereby the said Schreiber paid to the said Cunningham the sum of \$375, and also surrendered to said Cunningham a note for the sum of \$300 given to said Schreiber by said Cunningham, and that in consideration thereof the said Cunningham agreed to give possession of the west half of section 5, township 55, of range 20, in Chariton county, Missouri, and release said Schreiber from any and all claims and demands of the said Cunningham in or to said land, and that said settlement included the payment to said Cunningham for his interest in a crop of wheat that he had put in on said land in the fall of the year of 1910, the said Schreiber furnishing the seed wheat and the said Cunningham doing the work in putting in the crop, they to share in the wheat grown on said land, should a crop be realized, and including also in said settlement the small frame house in suit in this case, theretofore owned by said Cunningham, and being on said land, the said Cunningham executed the receipt read in evidence by defendant but without the words contained in said receipt as follows: 'except right to remove belongings and harvest wheat now on premises;' and if the jury so find and believe from the evidence they will make and return their verdict for the defendant."

There was no dispute but that by the agreement between plaintiff and Schreiber the plaintiff was the owner of the house with the right to remove the same. It is also conceded that there arose a dispute between plaintiff and Schreiber as to the former's right to the

possession of the farm for the year 1911, and that there was a compromise of that dispute by the terms of which plaintiff was to surrender possession of the farm. But whether or not in the compromise plaintiff agreed to surrender possession of the farm including the house in controversy was the sole issue in the case, and this issue was fairly presented in defendant's instruction No. 3. If it was agreed that plaintiff was to surrender the farm with the house in consideration that Schreiber surrender to plaintiff his note for \$500 and pay to him \$375, and that Schreiber did surrender to plaintiff said note and paid him \$375 and the writing called a receipt was signed by plaintiff containing the agreement and was, as such, delivered to Stewart, the banker, who was acting for Schreiber, defendant was entitled to recover, notwithstanding plaintiff subsequently made the said interlineation by which he reserved to himself the house.

Plaintiff's second instruction is not the law. It reads as follows: "The jury are instructed that if you shall find and believe from the evidence that plaintiff Cunningham, in the settlement made with Schreiber on February 27, 1911, understood that in such settlement he was reserving the house in question, and if you further find and believe that before such settlement was finally closed the said Schreiber had notice that such was Cunningham's understanding, and that having such notice said Schreiber caused or permitted such settlement to be finally closed without making known to said Cunningham that he, Schreiber, had a different understanding of such settlement, then and in that event the understanding of said Cunningham to the effect that he, Cunningham, was reserving the house, became the contract of the parties and is binding upon them." This is as much as to say that notwithstanding the two parties to the contract made a definite agreement, and there can be no dispute as to its meaning, yet it is not the contract of the par-

ties if one has knowledge that the other has misconceived its terms and thought it contained different terms, and that these different terms became the contract if the other contracting party was aware of the misconception. This seems to be a new view of the law governing contracts. It was plaintiff's business to know what the contract contained. The law presumes he did know. And if he did not it was his own fault. He was not an infant. The parties stood upon an equality and, in the absence of fraud, they are bound by its terms and not by what one of them thought but which it did not contain.

And it was error in refusing to permit defendant to prove that when the receipt was presented to him, after the interlineation, that he refused to accede to the interlineation. Plaintiff had been permitted to prove that he had, when it was presented to him, said it was all right. It was an important matter. If Schreiber acceded to the receipt as interlined it was very persuasive evidence that plaintiff had not agreed to surrender the house with the farm. The evidence offered was to show that he repudiated it when it was presented to him, which went to contradict that offered by plaintiff. For the errors noted the cause is reversed and remanded. All concur.

JOSEPH MATHER, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 27, 1912.

1. **NEGLIGENCE: Street Railways: Collision with Vehicle: Humanitarian Rule.** Plaintiff sued for damages for injuries received when the buggy in which he was riding was struck in the rear by an electric propelled street car. He was driving west and had just turned onto the street car track to go around

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a wagon ahead when someone warned him of the rapid approach of a west bound car. He then turned to get off the track when the car struck the rear axle of his buggy, and he was thrown out. No bell was sounded or attempt made to check the speed of the car before the collision. *Held*, that the conduct of the motorman as depicted in the evidence clearly was negligent under the humanitarian rule.

2. **INSTRUCTIONS: Defining Negligence.** The rule that the term negligence must be defined in instructions to the jury does not refer so much to a mere law dictionary definition as to a definition by the statement of facts or acts from which the inference of negligence would have to be implied.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

AFFIRMED.

John H. Lucas and *Hogsett & Boyle* for appellant.

I. B. Kimbrell and *W. B. Kelley* for respondent.

JOHNSON, J.—Plaintiff sued to recover damages for personal injuries received in a collision between a buggy in which he was riding and an electric street car operated by defendant. The petition alleges that the injury was caused by negligence in the operation of the car and includes negligence under the humanitarian rule as one of the causes. The answer is a general denial.

The cause is here on the appeal of defendant from a judgment of \$2770 recovered by plaintiff in the circuit court. The injury occurred in the morning of February 15, 1910, on Electric street in Independence. The street runs west from the courthouse several blocks and then deflects to the southwest. Defendant operates a double track car line on this street and the injury was inflicted by a westbound car running on the north track.

Plaintiff, who is a physician living in Independence and familiar with the locality in question, was riding westward on Electric street in a single buggy. His driver was doing the driving and, according to the evidence of plaintiff, the buggy was driven over the north rail of the westbound track a distance of over four hundred feet. They overtook a light delivery wagon that was being driven on the north side of the street and had just started to turn a little to the left to pass the wagon when someone called to them that a car was coming from behind and the driver immediately turned the horse to the right behind the delivery wagon to allow the car to go by. The car which was running at a speed of over fifteen miles per hour overtook the buggy before it could be driven from the track and the right side of the front end of the car—not the fender—struck the rear axle of the buggy about midway between the wheels. The impact threw the buggy to the right of the track and threw plaintiff to the pavement inflicting the injuries for which he seeks to recover in this action.

The buggy had a top and neither plaintiff nor the driver looked back to see if a car was approaching and neither knew of the presence of the car until a bystander shouted a warning a moment before the collision. Witnesses introduced by plaintiff say that the bell was not sounded nor did the motorman attempt to reduce speed until after the collision. Defendant's witnesses give a different version of the injury. They say the bell was sounded as the car neared the buggy and that until an instant before the collision the buggy was being driven on the pavement to the right of the track; that suddenly the driver attempted to pass the wagon in front by turning to the left and on to the track right in front of the car and that the car struck the left side of the buggy and threw it off the track.

The court overruled the demurrer to the evidence offered by defendant and at the request of plaintiff

gave instructions which submitted no other issue of negligence than that pleaded as a breach of the humanitarian duty defendant owed plaintiff. The principal instruction was as follows: "The court instructs the jury that if you believe from the evidence that the plaintiff, Joseph Mather, was, at the time and place in question, in a position of imminent peril of being struck by the car mentioned in evidence, by reason of the fact that the buggy in which he was seated was upon the track upon which said car was running, and that the motorman saw him in such position of danger, if any, or by the exercise of reasonable care would have so seen him in time to have slackened the speed of said car, or to have stopped the same, and avoided striking and injuring plaintiff, but negligently and carelessly failed to do so; and if you further believe and find from the evidence that by reason of the foregoing careless and negligent acts of said motorman, if you find them to have been careless and negligent, the buggy in which plaintiff was riding was struck and plaintiff was thrown out of the same and injured, then your verdict must be for the plaintiff, even though you believe and find from the evidence that plaintiff negligently placed himself in danger upon the street car track mentioned in the evidence."

Among the instructions given at the request of defendant were the following: "The court instructs the jury that if you find and believe from the evidence that the plaintiff either went upon the track or so close to the same, in front of the moving car when the car was so close to him that it could not be stopped by the exercise of ordinary care before it struck the buggy in which he was riding, your verdict must be for the defendant."

"If the physical facts, as shown by the evidence in this case, and common observation and experience are in conflict with and contrary to the testimony of any witness in this case, then it is your duty to take

into consideration such physical facts and common observation and experience, and to disregard the testimony of any such witness in conflict therewith, and contrary thereto, insofar as they so conflict.

"If you believe and find from the evidence that at the time and place in controversy plaintiff could, by the exercise of reasonable and ordinary care, have avoided injury from the car in question, and that he failed to do so, and by reason thereof, he was injured, then your verdict must be for the defendant."

It is argued by counsel for defendant that the court erred in overruling the demurrer to the evidence. Much stress is laid on the theory of the physical impossibility of the account of the injury given in the evidence of plaintiff. It is the idea of counsel that if this heavy, double-trucked street car, running from fifteen to twenty miles per hour had struck the rear end of the buggy, it would have demolished both of the hind wheels, and that since no such result followed the collision, we must dismiss plaintiff's version of the injury as a story too incredible to be believed. There is evidence that the left hind wheel was mashed down and that the rear axle was badly sprung. The position of the buggy as described by the evidence of plaintiff left only its rear end in the path of the car. The right wheel was in the clear, the left just over the north rail. The rear axle was in a highly obtuse angle with the rail and it is not difficult to believe that the corner of the car passed between the wheels and struck the axle a glancing blow, the result of which was the hurling of the buggy to the right. The reasoning of counsel for defendant applies with stronger and more persuasive force to the description of the injury in defendant's own evidence. If, as defendant's witnesses aver, the driver had turned the horse to the left and had driven on the track in front of the car, then not only the broadside of the vehicle but the horse as well was in the

path of the car and it is hard to understand how the buggy escaped demolition and the horse serious injury. We shall not hold that the evidence of plaintiff indisputably is contradicted by the conceded physical facts. The jury were entitled to draw the conclusion that the buggy was being driven along and astride the north rail of the track for a distance of over four hundred feet and that without giving any warning and without checking speed the motorman ran his car at high speed into a collision with a buggy in plain view on the track and that until too late for a collision to be averted, the driver of the buggy gave no sign of turning out to give the car a clear track.

It has been said by the courts of this state over and over again that the public streets of a city are for the general use of the public and that no class of vehicles is allowed a paramount right to any part of the street. The driver of a horse-drawn vehicle has a right to drive in that part of the street occupied by street railway tracks and cannot be convicted of negligence in so doing as long as he exercises his right reasonably and with due regard for the rights of others who are lawfully using the street. Inasmuch as street cars are run on fixed tracks at higher speed than that of horse vehicles the driver of a horse who has the whole roadway for his use has no right to appropriate a street car track to his own use and by obstinately remaining on the track unnecessarily obstruct or hinder the passage of street cars. To allow him such privilege would be to bestow on him a superior right to the use of the track. It is his duty when he is driving on a track in the same direction cars are operated thereon to give reasonable attention to the way behind him to discover the approach of a car and to make a reasonable effort to give way to the car in order that its progress may not be unnecessarily retarded. [Hicks v. Railway, 124 Mo. l. c. 123; Rapp v. Transit Co., 190 Mo. 144.]

Since the judgment before us is founded solely upon a breach of the last chance rule the issue of whether or not the peril of plaintiff was caused in whole or in part by his own negligence is unimportant and we pass from the duty of a traveler, such as he, to that of the operator of the street car. The car was being run at high speed and the motorman could see the buggy when it was a long distance ahead. He could see the driver was making no effort to turn out. He would have been justified in assuming that the occupants of the buggy would not be remiss in the observance of their duty but the law did not give him the right to rely implicitly on such presumption. It imposed on him the active duty of giving close attention to the vehicle as long as it remained in the pathway of the car and of keeping the car under such control that he could avert a collision by stopping should it turn out that the occupants of the vehicle were negligent and would not turn out in time.

The function of the humanitarian principle and its effluent rules is to deal with just such cases as this and to say that the motorman had a right to run his car at high speed to a collision with a buggy on the excuse that he assumed the buggy would leave the track at the last moment would amount to a repudiation of the principle and to a declaration that the driver of a horse vehicle could travel along a street railroad only at his own risk of injury. The conduct of the motorman as depicted in the evidence of plaintiff clearly was negligent under the humanitarian rule. The demurrer to the evidence was properly overruled.

Counsel for defendant object to the principal instruction given at the request of plaintiff on the ground, first, that it employs different forms of the words *careless* and *negligent* without defining the words. Instructions for the plaintiff which without defining the word negligence or stating any hypothe-

sis of facts merely directs a verdict on the finding that the injury was negligently inflicted are erroneous. As is said in *Hinzeman v. Railroad*, 182 Mo. l. c. 624:

“It is the duty of the court by instructions to submit to the jury questions of fact and enlighten them as to the legal effect to be given to the facts when found. When a man has committed certain acts we say he has been guilty of negligence, but when we submit the case to a jury we do not say if you find that the defendant has been guilty of negligence you should find for the plaintiff, but we define negligence in the instructions, and to say to the jury, if you find that the defendant has done certain acts in the manner covered by that definition, then he has been guilty of negligence and you should find accordingly.”

But where, as here, the terms are employed merely to characterize the acts stated in a given hypothesis a failure to define the words careless and negligent is not reversible error. The case of *Sweeney v. Railway*, 150 Mo. 385, is in point: “This (negligence) is a word the meaning of which is well understood and no definition of it was necessary. As used in the instruction it could not have been misunderstood by the jury, or in any way have misled them.” [See, also, *Rattan v. Railway*, 120 Mo. App. l. c. 279.]

The rule that the term *negligence* must be defined does not refer so much to a mere law dictionary definition as to a definition by the statement of facts or acts from which the inference of negligence would have to be implied. Or to state it differently the rule is merely corollary to the fundamental rule that the instructions of the plaintiff in negligence cases which relate to the issue of negligence must restrict the recovery to the precise acts of negligence pleaded in the petition. This point must be ruled against the contention of defendant.

Nor do we agree with defendant that the instruction failed to require the jury to find that plaintiff was oblivious to his peril and that both the peril and his oblivion were known or should have been known to the motorman. The facts of the hypothesis submitted in the instruction sufficiently embody those elements of a last chance cause though they were not stated in specific terms. Certainly the jury following the instructions were compelled in order to find for plaintiff to believe that his oblivion to his peril was real and obvious to the motorman had he been in the exercise of reasonable care. We find no prejudicial error in the instruction.

Objections to the rulings of the court on evidence are argued but all clearly are without merit and need not be discussed. Point also is made that the verdict is excessive but we think the assessment of damages was well within evidentiary bounds. The cause was fairly tried and the judgment is affirmed. All concur.

CLAUDIE MAY PYBURN, Respondent, v. KANSAS CITY et al., Appellants.

Kansas City Court of Appeals, May 27, 1912.

1. **MUNICIPAL CORPORATIONS: Excavations: Lights: Insurance: Duty.** It is the duty of those making excavations in the streets of Kansas City, on quitting work in the evening to provide properly secured lights of warning of danger to pedestrians or those driving along the streets. But such duty does not extend to a condition of insurance, and therefore there is no obligation to see that the lights are kept in place all night.
2. ———: ———: ———: ———: ———: **Instructions: Contradictory.** If an instruction is given for a plaintiff who drives into an excavation in the street, that it was the duty of a city and contractor who had excavated in the street, to see that the light was burning at the time plaintiff drove into it, it is prejudicial error which is not cured by a correct instruction given for defendants.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

REVERSED AND REMANDED.

John G. Park and *Henry S. Conrad* for appellants.

T. J. Madden for respondent.

ELLISON, J.—Plaintiff was injured by driving into an excavation made in one of the streets of Kansas City by defendant Thompson. She brought this action against both Thompson and the city, and recovered judgment against both in the trial court.

There was evidence tending to show that the city issued a permit to Thompson to make the excavation and that when made it was dangerous to those using the street, especially those driving vehicles after night. That plaintiff and another woman and some children were driving a one-horse vehicle along the street after dark, when they suddenly, without warning, drove into the hole. The evidence tended to show that in excavating the dirt was thrown up on the sides, perhaps three feet high, and that in protecting the place two railroad ties were used. The man who placed them said he put one "on the end of the dirt and the other on top; and I tied the lantern to it with a little piece of baling wire." There was no evidence directly contradicting the statement that the lantern was left lighted and fastened to the railroad tie. There was evidence tending to show that it was not lighted when the mishap occurred.

It was the duty of the defendants to protect people, in lawful use of the street, either by guarding the excavation, or by placing a red lantern so as that it could be seen and operate as a warning. But that duty was performed if the light was properly placed and secured by the workmen on quitting work on the evening prior to the injury. If it was displaced after-

wards, without defendant's fault, no blame can attach to them. [Myers v. Kansas City, 108 Mo. 480; Hesselbach v. St. Louis, 179 Mo. 505; Ball v. Independence, 41 Mo. App. 469; Welsh v. City of Lansing, 111 Mich. 589.]

The foregoing will make clear our view of the criticism on plaintiff's instructions wherein it was declared that it was the duty of defendants to have the place guarded or lighted *at the time* plaintiff drove into it. This declaration was emphasized in the instructions several times, and there can be no doubt that it could only have been understood to mean that though a light was properly placed several hours before, when the men quit work, yet if it was not there when plaintiff came along, a liability was incurred.

Contradictory instructions to the foregoing were given for the defendants, but where instructions are in direct conflict, as here, that of itself is error against the party whose instruction is right. For it is an injustice to a party that his correct instruction should be crippled by one which contradicts it. [Baker v. Ry. Co., 122 Mo. 533; Wojtylak v. K. & T. Coal Co., 188 Mo. 260, 283; Frederick v. Allgaier, 88 Mo. 598, 603; Goetz v. Ry. Co., 50 Mo. 472; Kelley v. United Railways Co., 153 Mo. App. 114.] This last case resembles the present one in essential particulars.

The instructions was especially harmful in this case since much evidence was heard as to when the light was burning and when not.

Question is made whether plaintiff's instructions did not put a double duty on defendants as to barriers and also lights. On retrial, the language used ought to be such as not to leave that a matter of the least doubt. However, an ordinance was introduced making it the duty to put up railing and provide lights. It should be made clear to whom this applies.

The judgment is reversed and the cause remanded. All concur.

IGNATZ J. STRAUSS, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 27, 1912.

1. **STREET RAILWAYS: Personal Injury: Belief of Motorman and of Plaintiff.** In a case under the humanitarian rule, though the plaintiff sees the approaching street car and attempts to cross the track in the belief that he can get over ahead of the car, this will not, as a matter of law, justify the motorman in believing the plaintiff will get safely over and excuse him from putting his car under control.
2. ———: ———: **Humanitarian Rule: Contributory Negligence.** In a case under the humanitarian rule, plaintiff's prior contributory negligence in getting himself in a perilous position, will not excuse the servants of a street car company in running him down, who have seen his peril in time to have stopped the car. Under the humanitarian rule contributory negligence is admitted.
3. ———: ———: ———: **Evidence: Objection: Time.** When a question is asked of the plaintiff about injuries which he has not included in those specified in his petition, and objection is made and objections stated to the court which do not include its not being pleaded, and they are overruled, and the witness answers, it is too late then to urge the failure to plead, as a reason why the question should not have been asked.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield*, Judge.

AFFIRMED.

John H. Lucas and *Charles N. Sadler* for appellant.

Oldham & James for respondent.

ELLISON, J.—Plaintiff's action is for damages alleged to have been caused by defendant running into his wagon with one of its street cars, throwing

him out and inflicting painful injury. He recovered judgment in the circuit court.

The action is founded on the humanitarian rule. Plaintiff was approaching defendant's street car track with his horse and wagon. He was driving, and his son sitting beside him. The evidence tends to show that he could have seen the approaching car for as much as two hundred feet from the crossing; and the motorman saw him, or could have, had he been looking, when he was one hundred and twenty-five feet away, as the view was not obstructed. Plaintiff drove along, in a walk, without stopping or urging the horse. He testified that the last time he saw the car it was about one hundred feet away, and he thought he had plenty of time to cross ahead of it. And upon that testimony defendant insists that if the plaintiff, knowing of the approach of the car, thought he had time to cross, he cannot blame the motorman for the same error of judgment.

But can we declare, as a matter of law, that if a plaintiff thinks he has time to cross a track before an approaching car can reach him, the motorman cannot be charged with negligence in failing to attempt to stop? That question is answered in the negative in *Heintz v. St. Louis Transit Co.*, 115 Mo. App. 667, 671. In that case Judge BLAND well says the fact that a motorman honestly believes with the plaintiff that the latter will be able to clear the track before the car reaches him, will not excuse the company, as a matter of law. For the motorman knows the speed of his car and the distance from the crossing, while the other party, looking into the end of the approaching car, cannot gauge its speed with any such accuracy. The two persons are not on equal ground, and the mistake of the person attempting to cross the track, will not, as a matter of law, justify the motorman in the same mistake.

We are cited to Roenfeldt v. St. Louis & S. Ry., 180 Mo. 554, 568, as stating a different rule. We think it does not. It is said in that case, where there was no evidence to show that the motorman could have stopped the car, that what was reasonable judgment for the plaintiff would be reasonable judgment for the motorman. But in the case at bar it *was* shown that the motorman could have stopped this car within forty feet.

Nor is it true, as seems to be contended by defendant, that in this case, founded upon the humanitarian rule, plaintiff's prior contributory negligence in getting himself into a perilous position, will relieve the defendant whose servants saw him, or by ordinary care could have seen him, in that position, in time, in the exercise of ordinary care, to have saved him by stopping the car. [White v. Railroad, 202 Mo. 539; Wing v. Railroad, 211 Mo. 1; Ellis v. Met. St. Ry. Co., 234 Mo. 657; Shipley v. Met. St. Ry. Co., 144 Mo. App. 7; Williams v. El. Ry. Co., 149 Mo. App. 489.]

The foregoing disposes of defendant's objection to plaintiff's instructions in submitting the case on the humanitarian rule and omitting any hypothesis of plaintiff's contributory negligence. Under the humanitarian rule contributory negligence is admitted and not in issue. [Johnson v. Ry. Co., 203 Mo. 381; O'Farrell v. Met. St. Ry. Co., 157 Mo. App. 618.] Nor do we see any ground for stating the instruction to be in conflict with others.

Refused instruction No. 9 does not present the question decided in Kinlen v. Ry. Co., 216 Mo. l. c. 164. The instruction submits whether plaintiff knowingly drove across the track "in such close proximity as to be struck," but does not submit that he drove across *knowing he would be struck*.

Nor do we think there was any substantial harm done in the answer of the doctor to the question about plaintiff complaining that he had pains in the abdo-

men, when such matter had not been mentioned with other specifications in the petition. We think that in the circumstances to be presently mentioned, it was not such an error as to justify reversal. But, aside from that, defendant is in no position to complain. When the question was asked, the defendant objected and stated reasons, but made no mention of its not being pleaded. Then, afterwards, after the question had been allowed under the objections as made, defendant moved to strike out the answer, and included a lack of pleading as one of the reasons. It should not have waited until the question was answered before giving its reasons against it. But the plaintiff made statements in evidence about his rupture, which was not among the matters specially pleaded. This, however, was specially stricken out by the court and the jury specially warned not to consider it. So, taking it all together, even if defendant had made objection as to the abdomen at the proper time, no harm was done.

We do not think the verdict excessive, and on the whole record see no reason for reversal. The judgment is therefore affirmed. All concur.

THOMAS CLARK, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 27, 1912.

1. **STREET RAILWAYS: Personal Injury: Humanitarian Rule: Instructions: Assuming Facts.** It is not improper, in a case of personal injury founded on the humanitarian rule, to refuse an instruction for defendant which assumes as facts matters which are in controversy.
2. ———: ———: ———: ———: **Practice: Evidence: Motion to Strike Out.** When an improper question is answered before objection can be made, the proper practice to so move to strike it out.

Appeal from Jackson Circuit Court.—*Hon. E. E.
Porterfield, Judge.*

AFFIRMED.

John H. Lucas and *Clarence S. Palmer* for appellant.

Boyle & Howell and *Jos. S. Brooks* for respondent.

ELLISON, J.—Plaintiff's action is for damages alleged to have accrued by reason of injury inflicted upon him by one of defendant's street cars. He recovered judgment in the trial court.

In the latter part of January, 1909, plaintiff was crossing Tenth street, from the north, near Garfield avenue, in Kansas City. On that street defendant has a double track street railway, running east and west with the street. After getting into the street, near the north track, he noticed a car coming from the west on the south track, and he stopped on the north track until it could pass. East of this the tracks turned south into Brooklyn avenue, which runs north and south, and on this account a car coming from the east on the north track could not be seen from where plaintiff was standing, further than a block. At the time plaintiff stopped on the north track, the car coming from the east could not be seen, the evidence tending to show that it turned onto Tenth street after plaintiff took that position waiting for the other car to pass. This car run plaintiff down as he carelessly stood in the street on the north track; the charge, under the humanitarian rule, being that the defendant's servants saw him, or by the exercise of ordinary care could have seen him, standing in such perilous position, in time to have avoided striking; that the car could have been stopped or "slowed down" with

entire safety to the passengers. The evidence tended to show the car to have been running at a rapid rate and that plaintiff was, or might have been seen, for a distance of near three hundred feet, and that the car could have been stopped much within that distance. The injuries inflicted were of the most serious nature and no point is made as to the amount of the verdict.

The first objection is that the court refused an instruction on the burden of proof being on the plaintiff. Ordinarily this, a common instruction, should be given. But no error can be predicated on the refusal of this one for the reason that it unwarrantably assumes as a fact that plaintiff "stepped in front of the car;" and that he "got in front of the car." These were assumptions that plaintiff stepped up in front of the running car so that it could not be stopped before striking him; while there was evidence tending to show that he was on the track when the car was nearly three hundred feet away with ample time to stop. It is a rule of law too familiar to need citation of authority, that it is error to assume as facts matters which are in controversy. It would have manifestly given color to defendant's theory at the expense of the evidence in plaintiff's behalf, and this of itself would have been improper. [Eckhard v. Transit Co., 190 Mo. 593, 620.]

The remaining objection is that the court overruled an objection to a question asked of the motorman who had charge of the car which struck plaintiff. The witness had been asked, without objection, whether he had been running double or single truck cars. He answered, double truck. Again he was asked and answered without objection that he was running a single truck when he struck plaintiff. At another time he was asked whether the track was one on which the company operated both double and single truck cars, and, without objection, he answered, "Not generally." He was then asked if he had seen others

run single truck cars over this track. This was objected to as irrelevant and the objection overruled. Then almost immediately he was asked the same question, that is, had he before this, either run himself, or seen others run, single truck cars over this track; and he answered that he had not. Objection was made, and the answer stricken out. This was the proper practice. [State v. Sykes, 191 Mo. 62, 79; Barr v. City of Kansas, 121 Mo. 22.] It is manifest from the record that the jury must have understood the entire matter of not having seen others run single truck cars, was stricken out. But conceding that it was not so understood, it would be trifling with justice to reverse a judgment for so trivial and inconsequential error; if it was error, which we by no means concede, it could not have influenced the jury improperly.

An examination of the record fails to disclose any ground justifying a reversal and the judgment is accordingly affirmed. All concur.

STATE ex rel. NED SWARTHOUT, Relator, v.
COUNTY COURT OF CASS COUNTY, Re-
spondents.

Kansas City Court of Appeals, May 27, 1912.

COURTS: Judgments: Courts of Appeals: Res Adjudicata. Where an issue has been decided by one of the Courts of Appeals, and afterwards is certified to the Supreme Court, under section 6 of Amendments to Constitution (R. S. 1909, p. 101) because of difference of opinion of another of the Courts of Appeals, such decision is not an adjudication of such issue thereafter arising in a case between the same parties.

Mandamus.

PEREMPTORY WRIT DENIED.

F. V. Kander and John A. Davis for relator.

J. S. Brierly and Charles W. Sloan for respondents.

PER CURIAM.—Relator by proper petition seeks to have this court, by its writ of mandamus, compel the county court of Cass county to grant him a license to keep a dramshop in that county.

It appears that at an election held in that county in 1907, the Local Option Law as to the sale of intoxicating liquors, was adopted. Shortly after its adoption, the same party now seeking to compel the county court to issue him a license, conceived the law not to be legally adopted and therefore applied to the county court for a license as a dramshop keeper. That court refused the license on the ground that the election was valid and therefore a license was forbidden. He then came to this court, alleging the election to be void and asking that we issue a writ against the county court commanding it to grant him the license. This court heard the cause, adjudged the local option election to be void, and rendered a judgment in his favor, and issued a writ commanding the court to grant him a license, which was done. The opinion in the case will be found reported under the title *State ex rel. Wirt v. Cass County Court*, 137 Mo. App. 698; *Wirt's* case and this relator's having been consolidated and heard as one. And a like opinion of the St. Louis Court of Appeals will be found in *State ex rel. v. Mitchell*, 115 S. W. 1098, approved in *State ex rel. v. Mitchell*, 139 Mo. App. 38.

The facts of the case and the reasons for our conclusions are there set out in full and need not be restated. Afterwards, a case arose in Newton county involving the same facts and conditions which appeared in the case upon which we acted. On appeal to the Springfield Court of Appeals, a view was taken

directly opposed to that of the St. Louis Court of Appeals and of this court (State v. Jaeger, 157 Mo. App. 328), in which the election in Newton county was held valid, in opinions by Special Judge MANN and Presiding Judge NIXON. The case was certified to the Supreme Court for final decision, and that court adopted the views and the opinion of Judge MANN, thus overruling the views expressed by the St. Louis Court of Appeals and this court. [State v. Jaeger, — Mo. —, 144 S. W. 103.]

After the decision in this court, the relator obtained licenses from time to time, as they expired, until now, in the present application, the county court has concluded, in view of the decision of the Supreme Court, that the local option election was valid, notwithstanding the decision of this court in the case above mentioned, and that therefore a license should be refused. In this we think the county court was clearly right. If, in the opinion of either of the courts of appeals, such court has rendered an opinion contrary to that of one of the other courts of appeals, it becomes its duty to certify the case to the Supreme Court, and that court's decision thereon is final and controlling. [Bank v. Woesten, 144 Mo. 407; Schafer v. Ry. Co., 144 Mo. 170; Wilden v. McAllister, 178 Mo. 732; Rodgers v. Ins. Co., 186 Mo. 248; Houck v. Waterworks & E. L. Co., 215 Mo. 475, 478.]

But relator insists that the matter of the invalidity of the local option election in Cass county, was finally decided by this court, and that it became *res adjudicata*, if again questioned. We do not agree to this. Certainly that case determined that he should get the license and would have protected him against prosecution during the life of the license. If any right had been determined and vested in relator by the former decision, he could forever after lay claim to it.

It would have become a matter finally adjudicated. But that claim cannot be made in a case of this kind.

The last decision of the Supreme Court is very properly made controlling in subsequent cases in the courts of appeals involving like questions. [Sec. 6 of Amendments to Constitution, adopted in 1884 (p. 101, R. S. 1909), and other authorities cited in respondents' brief.]

And it has been decided that a prior decision of one of the courts of appeals, in a case in which it has jurisdiction, is not *res adjudicata* even in the same case in the Supreme Court. [Hennessy v. Bavarian Brewing Co., 145 Mo. 104; Paddock v. Ry. Co., 155 Mo. 524; Sedalia to use v. Donohue, 190 Mo. 407.] So, therefore, if this case had been instituted in the Supreme Court, that court would not have been bound by our decision in the former case. If it would not have been binding on that court, it necessarily cannot be conclusively binding on this court. And therefore we find ourselves confronted with the constitutional command to conform our decisions to the last previous ruling of the Supreme Court involving like questions. [Sec. 6 of Amendments to Constitution, p. 101, R. S. 1909.]

A peremptory writ will be denied.

LELA RICHARDSON, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 27, 1912.

1. CARRIER: Passenger: Negligence: Degree of Care. It is not error to refuse an instruction that a carrier of passengers is only required to exercise "all care that was reasonably practicable." It is the duty of such carrier's servants to exercise the utmost care and skill which prudent men use in like business, in similar circumstances.

Richardson v. Railroad.

2. ———: ———: ———: **Instruction: Evidence.** It is improper that an instruction should single out specific parts of the testimony and direct special attention to them.
3. ———: ———: **Physician: Statement of Pain.** A physician may state complaints made to him by the patient in the course of his examination as to present pain.
4. ———: ———: ———: **Instructions: Non-Direction.** Non-direction, in the way of instructions, in a civil case, is not error.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

AFFIRMED.

John H. Lucas and *L. T. Dryden* for appellant.

I. B. Kimbrell for respondent.

ELLISON, J.—Plaintiff was a passenger on one of defendant's street cars in Kansas City when the car in which she was riding collided with another of defendant's cars at the intersection of Twelfth street and Brooklyn avenue, by reason of which she was greatly injured. On the same evening, and after the collision, she was injured in the vestibule of another car which she had boarded, by a large iron tool called a "jack" falling upon her leg. She brought an action in two counts and recovered judgment on each in the trial court.

Defendant first complains of the refusal of two instructions wherein defendant's duty in the matter of negligence was stated to be "care that was reasonably practicable," and that if "all care that was reasonably practicable had been used, then there was no negligence." Such instructions were given for the defendant in *Logan v. Met. St. Ry. Co.*, 183 Mo. 582, but no question was made of them and no discussion had and the judgment was affirmed. They are merely set out, with others, in the opinion, in stating the history of the action of the trial court, and are not referred to in approval or otherwise. The duty required to

be performed by a carrier of passengers is to exercise the utmost care, diligence and foresight which capable railroad men would use in similar circumstances. [Kirkpatrick v. Met. St. Ry. Co., 211 Mo. 68, 87.] Or, as expressed by the Supreme Court on another occasion, "the utmost care and skill which prudent men use and exercise in a like business and under similar circumstances." [Devoy v. St. Louis, Transit Co., 192 Mo. 197, 209.] It was, therefore, not error in the trial court to reject the phraseology of the instructions asked in this case. There is no need to experiment with words of doubtful meaning, or which may likely be applied so as to result in wrong conclusions.

It is said that there is nothing in the instructions which required the jury to consider certain specified evidence in its behalf. There are two reasons why this objection should be considered unsound. One, that it would be improper to single out specific evidence; and the other, that if that practice were proper, none were asked by defendant.

Nor do we see any objection to the examination of Dr. Krueger. He was not asked nor did he tell of statements made to him by plaintiff of pain suffered at some time in the past. His statements were confined to her complaints uttered during his examination of her, and were within the rule stated by the Springfield Court of Appeals, through Judge Cox, in Brady v. Traction Co., 140 Mo. App. 421.

Some difficulty appeared in framing a satisfactory hypothetical question to a physician as an expert. Objections were made to different forms until finally he was asked if the injury set forth in the question might have produced plaintiff's nervous condition, and he answered in the affirmative. To the questions as finally asked, no objection was made, and we cannot see that it is improper.

We can see no objection to a showing of plaintiff's

condition and the effect produced upon her in an attempt to walk on the street in the heat. We think it sufficiently recent from the injury and sufficiently connected, to have a tendency to show her condition as affected by the injury.

We think defendant's demurrer to the evidence on the second count was properly overruled.

Nor do we see that error was committed in admitting the deposition of plaintiff, who was in court. It had been first introduced by defendant and certain parts read. Then plaintiff undertook to read therefrom. Defendant's counsel objected generally, which was not the proper practice. He did, however, afterwards make specific objections with reasons and these were nearly all sustained. There were, however, some questions as to her condition which were permitted to be read. We think it was not error; and besides was not of sufficient substance to have affected the merits of the case, in view of other testimony.

As to instructions on measure of damages, if defendant wanted anything more than was given, it should have asked it. Mere non-direction on part of plaintiff is not error.

In our opinion the only matter of serious consideration in the case relates to the charge that the verdict is excessive. It was \$8000 on one count and \$300 on the other. There is no question as to the latter amount. The first looks large; but we find it has received special consideration from the trial court. The matter was gone over in that court with the result that a remittitur of \$1300 was required, leaving the judgment for the sum of \$6700, plus \$300 on the other count, a total of \$7000; and we have concluded, on account of the serious injury and the distressing condition in which plaintiff has been put, that we are not justified in requiring any further reduction.

The judgment is affirmed. All concur.

NANNIE FLOYD, Respondent, v. MODERN WOOD-
MEN OF AMERICA, Appellant.

Kansas City Court of Appeals, June 3, 1912.

FRATERNAL SOCIETY: Physician as Agent: Application: Estoppel: Concealment. Where a fraternal benefit association's examining physician takes the application of a member for a benefit certificate of insurance and himself writes down some of the answers and omits others on the ground that they are unimportant, the acts of the physician are the acts of the company, and it will not be allowed to say that there was a warranty that the application contained full and complete answers to the questions propounded therein, provided, that the applicant, in fact, made true answers as asked; and whether he did or not, there being evidence *pro* and *con*, was a question for the jury.

Appeal from Adair Circuit Court.—*Hon. Nat. M. Shelton*, Judge.

AFFIRMED.

B. D. Smith and Bailey & Hart for appellant.

Campbell & Ellison and Weatherly & Frank for respondent.

ELLISON, J.—Plaintiff is the widow of Vernon Floyd, deceased, and is the beneficiary in a certificate of life insurance issued to him on the 24th of November, 1908. Defendant is a fraternal benefit society and issued the certificate to Floyd as a member thereof. Floyd died in January, 1909, and defendant refused payment of the certificate. This action followed, and plaintiff recovered judgment in the circuit court.

The defense is based upon answers given by deceased in his application for the certificate, which defendant insists were false and thereby invalidated the certificate in plaintiff's hands as beneficiary. The

questions to which the answers charged to be not full and complete, and therefore false, were, whether he had ever been treated by a physician within seven years prior to the 6th of November, 1908, the date of the application, and if so, to give the names of physicians treating him, etc. The answer was: Yes, that he had been treated by Dr. Wilcox for smallpox. He likewise answered that he had never had rheumatism or disease of the heart; and that a sister had died of typhoid fever after five week's illness. Defendant insists that all these answers were knowingly false.

Plaintiff admits the answer to the question of treatment by physicians in the past seven years is not full and complete. But defendant's "Deputy Head Consul," who solicited applications for membership, testified that he was present during the time that part of the application in question was being put in writing. That the answers were written by defendant's examining physician and that the deceased told of other ailments than smallpox he had had in the past seven years, such as bad colds, billious attacks, and stomach troubles, but that these were termed not serious by defendant's agent and that it was not worth while to state names of physicians, if any.

There was testimony in plaintiff's behalf tending to show that deceased's answers were true as to his never having had rheumatism, or disease of the heart. This evidence came from persons in a position to know. Some were his employers, who had observed him through a series of years as a laboring man engaged in different kinds of work, requiring strength and endurance, and they had never heard of his being sick, or observed that he was, nor had they heard him complain. The report of defendant's examining physician, giving details of his examination, shows deceased to have been a strong man without sign of organic disease. Defendant's soliciting agent went with deceased to the examining physician's office,

which was on the second floor, and stated that deceased ran up the stairway two steps at a time.

So there was evidence tending strongly to show that deceased acted with the utmost candor in regard to his sister's death and its cause. He told defendant's physician he did not know the cause of her death, except that he heard it was typhoid fever; that his mother said she thought that was the cause of her death; and that he had heard she had consumption, "but that his mother claimed there was no consumption in the family." Plaintiff, deceased's widow, testified that she never heard him complain of rheumatism or heart disease, and that she had not detected any sign of such ailments. There was also evidence tending to discredit evidence in plaintiff's behalf. On the whole record, there was abundant evidence to sustain the verdict, and the judgment must be affirmed unless there was error in the ruling of the trial court.

Defendant, as a fraternal association, is exempt from the statute regulating general insurance companies, and while the effect of a warranty in general insurance is much qualified by the statute, in fraternal companies the warranty contained in an application, though in relation to matters of health not associated with the death of the applicant, is binding upon the applicant. This is abundantly supported by authorities to be found in defendant's brief. But where the agent of the insurance company, whose duty it is to take the application, whether it be fraternal or general company, himself propounds the questions and writes the answers, his acts are the acts of the company. If, therefore, the applicant answers the questions truly and the agent only writes down what he calls the important part of what the applicant told him, declaring the balance was of no consequence and need not be put down, the agent will be held to be the company's agent for the purpose of writing down what was necessary to be stated, and it will not be permit-

ted, after the applicant's death and the insurance is demanded, to say that there was a breach of warranty as to full and complete answers. [Shotliff v. Modern Woodmen, 100 Mo. App. 138, 152; Thomas v. Hartford Fire Ins. Co., 20 Mo. App. 150.] These cases are fully supported by decisions of the Supreme Court therein cited. [See, also, Kausal v. Ins. Co., 31 Minn. 17.] The trial court was therefore right in admitting evidence to show that defendant's examining physician took deceased's application and wrote down his answers therein, and that deceased had told him of his other complaints or ailments, but that the physician said it was not necessary that it should be put down, and himself omitted it.

What we have written covers the matter of warranty as to the cause of the death of deceased's sister.

Principal among the authorities cited by defendant is that of Modern Woodmen v. Angle, 127 Mo. App. 94. The case does not support defendant. It is there written (p. 109), as we have herein stated, that: "Under the authorities, Dr. Crewdson, then acting in the capacity of camp physician, was then and there agent of the society with authority to determine the materiality of the answers and waived the society's rights with respect thereto, and therefore, if possessed of the facts with respect to all these matters, as he was, he wrote the answers as he deemed them material, the insurance society will be deemed to have waived its right with respect to the answers being literally true in that regard, and is estopped from asserting their untruth as a breach of the warranties."

It is true in that case the certificate of insurance was cancelled; but it was for the reason that there was evidence conclusively showing deceased knowingly concealed material matters and did not state the facts to the physician, so that he might have an opportunity of judging whether it was necessary to be written

down. In the case at bar there was evidence, as we have already stated, strongly supporting the theory that deceased did not conceal anything from the physician; and while there was also evidence to the contrary, it was a question for the jury to decide.

The instructions given for plaintiff were in accord with the views above stated. They made it plain to the jury that while defendant's physician, in writing down deceased's answers, was the agent of defendant, yet, if deceased concealed or misrepresented anything to such physician, there could be no recovery. Defendant's instructions were amended by the court, and properly. As asked they, in effect, cut out the propositions of law herein stated, and required a verdict for defendant even though its physician was put in possession of all the facts by deceased.

We have found no error in the record, and hence affirm the judgment. All concur.

In the Matter of the Copartnership Estate of D. D. PERKINS & COMPANY, late Copartnership composed of DAVID D. PERKINS and EDMUND ANIBAL, both deceased.

THE WHITE CLOUD MILLING AND ELEVATOR COMPANY et al., Appellants, v. W. S. THOMSON, Administrator et al., Respondents.

Kansas City Court of Appeals, June 3, 1912.

1. **ADMINISTRATION: Partnership Estates: Priority of Claims.** While a firm member may be a creditor of his firm, he can only be a secondary creditor, that is, however unequally the members of a firm may have contributed to the firm assets, and however much the firm may be owing any member thereof on account of such excess contributions, no firm member can take anything from an insolvent firm's estate in process of liquidation until after all of the general firm's debts have been satisfied.

Elevator Co. v. Thomson.

2. ———: Allowance of Claims: Equitable Priority: Res Adjudicata. The right of equitable priority is not affected by the statutes relating to the allowance and classification of demands and the equitable priorities of creditors are not foreclosed by a judgment of allowance and classification.
3. PARTNERSHIPS: Priority of Creditors: Rights of Partners. Where a partner pays firm's debts with his individual funds, being separately as well as jointly liable therefor, he does not become subrogated to the rights of such creditors against the partnership. He only acquires a valid demand against his partners which should be paid out of what remains after the partnership creditors are fully satisfied.

Appeal from Holt Circuit Court.—*Hon. William C. Ellison*, Judge.

REVERSED AND REMANDED (*with directions*).

H. T. Alkire and *J. B. Shackleford* for appellants.

R. B. Bridgeman, *S. R. Halstead* and *C. C. Crow* for respondents.

JOHNSON, J.—This contest is between creditors of a partnership estate over the question of priority between demands allowed by the probate court and assigned to the fifth class. The appealing creditors filed a petition in the probate court praying that their demands be given priority over the demand allowed in favor of the individual estate of one of the partners. The probate court sustained the prayer of the petition and ordered that in the payment of debts belonging to the fifth class the general partnership creditors be paid in full before anything be paid on the demand in favor of the estate of the deceased partner. The circuit court, where the cause was taken by appeal, entertained the opposite view and ordered that the funds applicable to the payment of all fifth class demands be pro rated among all such demands including that of the individual estate. From this or-

der and judgment the petitioning creditors appealed to this court.

There is no serious dispute over the facts of the case. David D. Perkins and Edmund Anibal were partners doing business as general merchants in Craig, Holt county, in the firm name of D. D. Perkins & Company. The partnership became indebted to Perkins in the sum of \$7069.34 for advances made by him to pay debts of the firm aggregating that amount. No part of that indebtedness was paid and Perkins died November 30, 1907, a creditor of the partnership in the amount stated. On December 5, 1907, Anibal was appointed administrator of the partnership estate by the probate court of Holt county and W. S. Thomson on the same day was appointed administrator of the individual estate. Anibal died in December, 1908, and R. M. Guilliams and W. J. Randall were appointed administrators *de bonis non* of the partnership estate. An administrator was appointed of Anibal's individual estate.

During the first year of the administration of the partnership estate and while Anibal was the administrator, Thomson, the administrator of the individual estate of Perkins, presented for allowance against the partnership estate a demand for \$7069.34, the indebtedness of the partnership to Perkins at the time of his death. The demand was allowed by the probate court February 11, 1908, and assigned to the fifth class. No objection was made to the allowance and classification and no appeal was prosecuted. Demands of other partnership creditors were presented during the first year of the administration and were allowed and assigned to the fifth class. The total of the allowed claims in this class exceeded \$17,000. The estate is in process of administration and is insolvent. Its appraised value was \$19,222.67, but the assets have depreciated and will fall far short of paying all of the

claims of the fifth class. The individual estates of Perkins and Anibal are also insolvent.

The petitioning creditors own demands allowed against the partnership estate and assigned to the fifth class. They filed the present petition on September 16, 1909, more than eighteen months after the allowance of respondents' demand and at a subsequent term of the probate court. Their position is disclosed in the following quotation from the petition:

"By reason of the foregoing your petitioners respectively assert that said claims of your petitioners, and those of other like creditors of said copartnership estate which were duly presented and allowed by this court against said estate during the first year of the administration thereof are entitled to priority over the said claim in favor of the individual estate of the said David D. Perkins in the distribution of the assets of said copartnership estate and should be paid in full therefrom before any part thereof is applied to the payment of said claim in favor of said individual estate.

"Wherefore your petitioners respectfully pray, in behalf of themselves and other like creditors of said copartnership estate, that an order be now made by this court directing that nothing be paid on said claim in favor of said individual estate of said David D. Perkins from the assets or funds of said copartnership estate except after and until after the claims of your petitioners and other like creditors of said copartnership estate shall have been fully paid."

On the facts stated the circuit court rendered the following judgment: "Now on this, the 15th day of January, 1910, same being the 12th day of the regular January, 1910, term of the circuit court of Holt county, Missouri, this cause coming on for hearing on the merits of the partnership creditors' petition, said partnership creditors appearing in person and by H. T. Alkire and J. D. Shackelford, their attorneys, and W.

S. Thomson, administrator, appellant, appearing in person and by R. B. Bridgeman and John Kennish, his attorneys, and W. J. Randall and R. M. Williams, administrator of the partnership estate of D. D. Perkins & Company, appearing in person and by H. B. Williams, their attorney, and the cause being submitted to the court by agreement of all the parties, and the evidence having been heard in full, and the court having seen and heard said petition, and considered the evidence and arguments of counsel, doth find that the claim of W. S. Thomson, as administrator of the estate of David D. Perkins, deceased, in the sum of \$7069.34, was regularly allowed by the probate court of Holt county, Missouri, on the 11th day of February, 1908, and assigned to the fifth class of demands. The court further finds that the partnership creditors, who are claiming priority of payment herein, including the demand of W. S. Thomson, as administrator, for \$7069.34, were allowed during the first year of administration of said partnership estate. The court further finds that after the allowance and classification of the demand of W. S. Thomson, as administrator, on the 11th day of February, 1908, there was no appeal taken from said allowance and classification, nor was there any motion filed for rehearing, as provided by section 214, Revised Statutes 1899.

“It is therefore ordered, adjudged and decreed by this court that the petition of the partnership creditors for priority of payment over the claim of W. S. Thomson, administrator of the estate of David D. Perkins, deceased, be and the same is hereby dismissed; and that the claims of the petitioning partnership creditors be not given priority of payment over the claim of W. S. Thomson, administrator of the estate of David D. Perkins, deceased, but that all claims allowed against the said partnership estate of D. D. Perkins & Company be paid according to their respective class and pro rata, and it is further ordered that the

defendants herein go hence without day and recover of petitioners all costs in this behalf expended.

“And it is further ordered that the clerk of this court be, and he is directed to certify a transcript of the record and proceedings of this cause, together with the original papers in this case, to the probate court of Holt county, Missouri, for further proceedings in accordance with this judgment.”

Section 190, Revised Statutes 1909, provides the exclusive method and order for the classification of demands against the estates of deceased persons. The first four subdivisions relate to preferred demands such as funeral expenses, expenses of last sickness, taxes and judgments existing at the death of the decedent. Then comes the fifth subdivision which comprises “all demands, without regard to quality which shall be legally exhibited within one year after the granting of the first letters on the estate.” The sixth subdivision relates to demands of the nature of those specified in the fifth class but which are not exhibited until after the end of one year from the granting of letters.

Section 191 provides that “all demands not thus exhibited in two years shall be forever barred.”

Section 216 requires that all demands be paid in the order of their classification; that no demand of one class shall be paid until all previous classes be satisfied and that “if there be not sufficient to pay the whole of any one class, such demands shall be paid in proportion to their amounts.”

These sections are made applicable to the administration of partnership estates by section 99, Revised Statutes 1909, as follows:

“The administration upon partnership effects, whether by the surviving partner or executor or administrator of the deceased partner, shall in all respects conform to administrations in ordinary cases, except as otherwise herein provided; and the person

administering upon partnership effects, and his securities on his official bond, shall perform the same functions and duties, be governed by the same limitations, restrictions and provisions, be subject to the same penalties, liabilities and actions, as other administrators and their sureties."

It was incumbent on the creditors of the partnership estate of Perkins & Company to present their demands for allowance in the time and manner prescribed by the general statutes and it was the duty of the probate court to classify the demands and assign them to classes in accordance with the provisions of sections 190 and 191 and regardless of questions of equitable priorities between demands belonging to a given class. The classification statutes make no provision for the determination or even recognition of such disputes. A creditor exhibiting his demand within one year from the granting of letters is entitled to have it allowed if he establishes it in the method prescribed and to have it assigned to the fifth class, if it falls within the statutory definition of that class, notwithstanding the fact that other demands of that class may be entitled to priority in payment over his. To say otherwise would be to hold that a creditor whose claim was subject to such equities would have no right to have his claim classified and allowed since the classification statutes, in making no provision for the adjudication of disputes over questions of priority, has omitted to provide a class for claims which in equity should be postponed to others of the same statutory classification.

We think the better construction of the statutes supports the view that a creditor of an estate whose demand properly belongs to the fifth class should not be precluded from an allowance of his claim and its assignment to that class by the fact that his claim is subject to equitable rights of other creditors of the same class.

Respondent Thomson properly contends that as administrator of the separate estate of Perkins he had the right to exhibit the demand of that estate for allowance against the partnership estate and that the probate court in the classification and allowance of the demand acted within the mandate of the statute. Further, respondent argues that "the allowance and classification of respondent's demand was a judgment of a court of record having all of the binding force and effect of a judgment of any other court of record and after the time for taking an appeal from the judgment of allowance and classification had passed, that judgment could not be annulled by an order of the probate court postponing the payment of the demand to the payment of all other demands of the same class."

It is unnecessary to refer to the numerous authorities supporting the rule that the judgments of probate courts allowing and classifying demands against estates are judgments possessing the attributes of judgments of courts of general jurisdiction.

The rule is succinctly stated in *Cooper v. Duncan*, 20 Mo. App. 1. c. 359, where this court, speaking through ELLISON, J., says: "The probate courts of this state in the allowance and classification of demands against estates are upon the same footing with courts of general jurisdiction and their judgments possess the same efficacy and solemnity and the same presumption of validity attach to them as to circuit courts. [*Johnson v. Beasley*, 65 Mo. 250; *Smith v. Simms*, 77 Mo. 269, 270; *Henry v. McKerlie*, 78 Mo. 416.]"

Undoubtedly such a judgment unappealed from within the time allowed by law is a finality and is *res adjudicata* as to all issues properly belonging to the cause on which the judgment is founded. [*Donnell v. Wright*, 147 Mo. 639; *Paving Co. v. Field*, 132 Mo. App. 628.]

But we do not agree with respondent that the question of priority between the creditors of the fifth class was one of the issues concluded by the judgment allowing and classifying his demand. It is true that the statutes—sections 216 and 96—provided for prorating the funds of the estate among the members of a class where the estate is not sufficient to pay all such demands in full. But the statutes to which we have referred, including those just mentioned, after all is said, merely provide and profess to provide an orderly method of procedure and are not intended to have any effect on issues between creditors of an equitable nature. [Hundley v. Farris, 103 Mo. 78; Level v. Farris, 24 Mo. App. 461; Ault v. Bradley, 191 Mo. 731; Rogers v. Meranda, 7 Ohio St. 192; Irby v. Graham, 46 Mass. 425; Smith v. Mallory, 24 Ala. 628; Black's Appeal, 44 Pa. St. 508.]

In *Hundley v. Farris*, supra, the Supreme Court say: "Our statutes looking to the classification of demands against the estate of a deceased member of a partnership and the distribution of his estate have no effect whatever on such priority. They were not intended to have any such effect. The well settled equities in such cases are not to be thwarted or overthrown by mere methods of procedure, such as those statutes authorize. This point has frequently been thus ruled in states possessed of statutes similar to our own."

In *Level v. Farris*, supra, this court say: "This right (of priority) is not to be controlled by the provisions of the statute respecting the classification of demands against estates. To give it such effect would be outside of the reasonable intent of the Legislature. 'They had nothing more in view than the administration of a single fund among its own peculiar creditors. The first was a matter easily subjected to a set of single rules; but the second could not be touched by a hand so violent without throwing the whole into

inextricable confusion and destroying all justice and equitable distribution.' ”

To the same effect is the decision in the later case of Ault v. Bradley, where our Supreme Court expressly reaffirm what is said in the quotation from the opinion in Hundley v. Farris.

The only authority outside of this state to which we shall make special reference is the decision of the Supreme Court of Alabama in Smith v. Mallory, *supra*. Speaking of statutes similar to ours the court say: “The object of the statute was, not to affect in any way the priority of right which the separate creditor had against the estate of the deceased copartner, but simply to allow the creditor of the firm to assert his claim against such estate in a court of law, instead of a court of chancery. If the estate of the deceased partner was solvent, he obtained his debt by a more simple process; but if insolvent, the creditors who had a superior claim preserved their advantage.”

There are some points of difference between the facts of the present case and those of the cases we have noted, but they are without effect on the applicability of the rule to the present case. These authorities are determinative of the controlling rule that the right of equitable priority is not affected by the statute relating to the allowance and classification of demands and of the resulting rule that the equitable priorities of creditors are not foreclosed by a judgment of allowance and classification. We must hold that the issue raised by the general creditors of the partnership in their petition was not *res adjudicata* and was properly raised on application for an order of distribution which order, itself, is a judgment from which an appeal may be prosecuted. [Estroth v. Young, 78 Mo. App. 651.]

“While a firm member may possibly be a creditor of his firm, he can only be what we may style a secondary creditor, that is, however, unequally the

members of a firm may have contributed to the firm's assets, and however much the firm may be owing any member thereof on account of such excess contributions, no firm member can take anything from an insolvent firm's estate in process of liquidation until after all of the general firm's debts have been satisfied."

This proposition quoted from the brief of appellant is fully sustained by the authorities. [Lyons v. Murray, 95 Mo. 23; Ross v. Carson, 32 Mo. App. 148; Funk v. Seehorn, 99 Mo. App. 598; 22 Am. & Eng. Ency. Law (2 Ed.), 195; 30 Cyc. 542.] In Lyons v. Murray, supra, the Supreme Court say:

"The plaintiffs insist that where one partner voluntarily pays debts of the firm with his individual means, he thereby becomes a creditor of the firm for the amount thus paid, and is entitled to be subrogated to all of the rights of the creditors whose debts he paid, and hence, in equity, the \$8972 was the money of Murray. But under our law a partnership debt is joint and several. Murray was bound, individually, for the payment of these partnership debts held by Luce, and his individual property could have been taken on executions therefor, and this, too, though the partnership was dissolved and in liquidation by reason of the death of Van Horn. When Murray paid these partnership debts he did not stand in the shoes of the creditors. He could not, with these debts paid by him, come in competition with the other firm creditors. He had the right, however, to bring these payments into his accounts, and after the payment of the other partnership debts the amounts thus paid by him would go to his credit in a settlement as between the partners. Neither he nor his individual creditors could demand more than his proportionate share of the residue on a balance and settlement of the accounts as between the partners."

In paying debts for which he was separately as well as jointly liable Perkins merely did what his obligation to the firm creditors compelled him to do. He did not purchase their demands and thereby become subrogated to their rights and remedies against the partnership but he paid his own as well as his firm's debts and thereby cancelled all rights of such creditors. In paying out of his own pocket debts of the partnership which, as between him and his partners, should have been paid by the firm, he acquired a valid demand against his partners which should be paid out of the partnership estate for distribution among the partners. Such estate consists only of what remains after the partnership creditors are fully satisfied. To allow a partner creditor to participate with the general creditors of an insolvent partnership estate would be at variance with the fundamental rule that the obligation of the members of a partnership to its creditors is joint and several and not merely joint.

It follows from what has been said that the learned trial judge erred in holding that respondent's demand was entitled to prorate with the demands of the petitioners. Accordingly the judgment is reversed and the cause remanded with directions to enter judgment in accordance with the views expressed. *Broadus, P. J.*, concurs. *Ellison, J.*, dissents.

B. L. FLYNN, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.**Kansas City Court of Appeals, June 3, 1912.**

1. **NEGLIGENCE: Humanitarian Rule: Excessive Speed: Pleading.** The allegation of the two acts of negligence in the petition, viz., excessive speed and negligence under the humanitarian rule do not make the pleading bad, on the ground that they are so inconsistent that each destroys the other. Such acts may be alleged in the same petition (*Gaedis v. Railway*, 161 Mo. App. 225).
2. **HUMANITARIAN RULE: Discovery of Peril.** The beneficent principle of the humanitarian doctrine does not take into consideration the origin of the peril of the plaintiff which culminated in his injury, but whether he was careful or negligent requires of the operator of the car the exercise of reasonable care to discover the peril and avoid the threatened injury.
3. **———: Two Principal Tests.** In cases involving the humanitarian rule there are two principal tests: First, was the plaintiff in danger of which he did not become aware until too late to save himself and, second, was his peril obvious to a reasonably careful man in the position of the motorman at the time when the latter had a reasonable opportunity to prevent the injury?
4. **NEGLIGENCE: "Last Chance:" Sole Cause.** Where a clear case of "last chance" negligence is presented, such negligence occupies the whole field of culpability and must be considered as the sole producing cause of the injury.
5. **INSTRUCTION: Damages: Maximum to be Recovered.** An instruction which, in effect, told the jury that the maximum of the damages plaintiff could recover under the petition, would be a reasonable assessment of damages, is not erroneous under the ruling in *Stid v. Railway*, 236 Mo. 382.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

AFFIRMED.

John H. Lucas and *Charles N. Sadler* for appellant.

H. J. Latshaw for respondent.

JOHNSON, J.—Plaintiff, a teamster, was injured in a collision between his team and wagon and an electric street car operated by defendant, and alleges that his injury was caused by negligence in the operation of the car. In his petition for damages he charges two acts of negligence, viz., *first*, that defendant ran the car at a high and dangerous rate of speed, and *second*, that the operators of the car saw or should have seen the peril of plaintiff in time to have avoided the injury by stopping the car had they been in the exercise of reasonable care. The answer of defendant is a general denial. A trial of the issues resulted in a verdict and judgment for plaintiff in the sum of three thousand dollars, and the cause is here on the appeal of defendant.

The injury occurred in the forenoon of November 9, 1909, on Nineteenth street between Cherry and Holmes streets in Kansas City, at a point twenty-five or thirty feet east of Cherry street. Nineteenth street runs east and west, is paved and its pavement for vehicles is thirty-three feet, six inches wide. Defendant operates a single track street railway along the middle of the pavement and all cars run on that track are eastbound. The distance between the north rail of the track and the curb on the north side of the street is fourteen feet seven inches. Going eastward Nineteenth street crosses Locust, Cherry and Holmes streets in the order named. There is an alley in the block between Locust and Cherry streets and the distance from the alley to Cherry street is 142 feet. Cherry street is about fifty-five feet wide.

Plaintiff was driving a two-horse dirt wagon loaded with a stone that weighed about 3000 pounds. He was going west on Nineteenth street on the pavement north of the track. A two horse wagon belonging to the street cleaning department of the city was standing headed east on this part of the pavement, at a point twenty-five or thirty feet east of Cherry street,

and it became necessary for plaintiff to drive on the track to go around this team and wagon. He deflected his horses towards the track when they were fourteen or fifteen feet east of the standing team and states that just before he did this he looked up and saw a car coming from the west at rapid speed, but concluded that he would have time to go around the obstruction and clear the track before the arrival of the car, and went onto the track, his team and wagon astride the north rail. It was his purpose to keep on the track while passing around the obstruction and to allow only a sufficient clearance space between his wagon and the other. Thinking no danger from the car was to be anticipated he bestowed his attention on the wheels of the other wagon to prevent colliding with them, and did not discover his danger from the car until he looked up and saw it just in front of his team coming on at high speed. At this time the rear wheels of his wagon were about opposite the middle of the other wagon and he was just beginning to turn his horses off the track. A violent collision occurred and plaintiff was severely injured.

Plaintiff's team and wagon were from twenty to twenty-five feet long and the conclusion is reasonable that the distance traveled by the team from the point where they were turned towards the track to the point of collision approximately was forty-five or fifty feet. Another reasonable conclusion from the evidence is that the team walked at a speed of about three miles per hour. There is evidence to the effect that the car was at the alley between Cherry and Locust streets when it became apparent that plaintiff intended to go around the stationary wagon by driving on and along the track and that, therefore, the car was 200 feet or more west of the place of the collision. At that time the speed of the car was from twelve to fifteen miles per hour and witnesses introduced by plaintiff testified that no effort was made by the motorman to stop or

reduce speed. The car was of the double truck type and was equipped with air brakes and other appliances for keeping it under control. It was well filled with passengers and while the rails were wet there is some evidence tending to show they were not slippery. Plaintiff's expert evidence states that the car could have been stopped in fifty-five or sixty feet with safety to the passengers, while experts introduced by defendant say that from 100 to 200 feet would have been required. Plaintiff, who was sixty-four years of age, was sitting on the front end of the wagon bed and made no effort to escape. He explains that the diversion of his attention from the car to the wagon he was passing prevented him from making any effort to escape by jumping off his wagon.

The court refused defendant's instructions in the nature of a demurrer to the evidence and on behalf of plaintiff gave the following instructions: "The court instructs the jury that if you find for plaintiff, then you may allow him such a reasonable amount, not to exceed the sum of \$6950, as you may find and believe from the evidence and under the instructions of the court would fairly and reasonably compensate him for the injuries, if any, to plaintiff's left leg or left shoulder, received on November 9, 1909, on East Nineteenth street, between Cherry and Holmes streets, in Kansas City, Missouri, by reason of a collision between his wagon and one of defendant's street cars."

"The court instructs the jury that even though you may find and believe from the evidence in this case that plaintiff was negligent and careless in driving upon defendant's track, under the facts and circumstances in evidence, still if you further find and believe from the evidence that defendant's motorman saw, or by the exercise of ordinary care and caution could have seen, plaintiff with his wagon in a perilous position upon said track, and in a position upon said track where his horses and wagon would necessarily

be struck by an eastbound car, within reasonable time for said motorman to thereafter have stopped his car and with due regard to the safety of the people upon said car, and before striking plaintiff's said horses and wagon, and thus avoided injuring plaintiff, but that said motorman negligently failed to do so, and as a direct result thereof plaintiff's horses and wagon were struck by said car, in direct consequence of which plaintiff was injured, then your verdict must be for the plaintiff."

"By ordinary care as used in these instructions is meant such care as an ordinarily prudent person would exercise under similar circumstances. And by negligence as used in these instructions is meant a lack or want of said ordinary care."

First, we shall consider the points argued by counsel for defendant in support of their contention that the court should have directed a verdict for defendant.

The first of these points is that the two acts of negligence alleged in the petition, viz., excessive speed and negligence under the humanitarian rule are so inconsistent that each destroys the other and, therefore, the petition should be regarded as stating no cause of action. We disposed of the precise question in the recent case of *Gaedis v. Railway*, 143 S. W. 565, where we held that such acts are not inconsistent and may be alleged in the same petition. We have nothing to add to what was said in that opinion and refer to it for an expression of the views we hold on this subject.

Next, it is urged that plaintiff's own evidence discloses that his negligence and not any negligence of defendant was the proximate cause of his injury. It will be observed that in his instructions plaintiff abandoned the first charge of negligence, i. e., running the car at excessive speed and submitted the case only on the issue of whether or not his injury was caused

by negligence under the rules of the humanitarian doctrine. Since the verdict was based entirely on the finding that such negligence was the proximate cause of the injury, we shall start with the concession that the peril of plaintiff was created by his own negligence in driving on the track in front of a rapidly approaching car and in suffering his attention to become diverted from the car. Let us see if this concession compels us to reach the conclusion advocated by defendant that the facts and circumstances of the case afford no room for the application of the humanitarian rule.

The beneficent principle of the humanitarian doctrine does not take into consideration the origin of the peril of the plaintiff which culminated in his injury, but whether he was careful or negligent requires of the operator of the car the exercise of reasonable care to discover the peril and to avoid the threatened injury. The principle is not for the benefit of one who with full knowledge of the danger wilfully or wantonly rushes into it. [Kinlen v. Railway, 216 Mo. l. c. 164.] But it must be borne in mind that knowledge of the presence of a force that may or may not be injurious does not necessarily imply knowledge of the actual peril caused by such presence. Frequently the negligent and some times even the careful "have eyes and see not," hold in envisagement all of the elements of a dangerous situation but are oblivious to the danger. Such a person so entering into peril of his own volition cannot be called wilful or wanton, but only negligent and he becomes an object of solicitude to the vital principle of the humanitarian rules.

The inference is clear that plaintiff passed from a position of safety to one of danger when he turned his horses on to the track. The car then was, perhaps, 250 feet away and there was nothing to prevent the motorman, who could have stopped within one hundred feet, from seeing and knowing that plaintiff was

driving into the path of the car with a heavily loaded and slowly-moving vehicle, and we say that the negligence of plaintiff in acting on the erroneous supposition that he could drive around the obstruction in safety did not make him an outlaw and justify the motorman in casting all care to the winds, and without putting forth any effort to save him, deliberately run with unabated speed to a collision with the team and wagon.

There are two principal tests in cases of this character: First, was the plaintiff in danger of which he did not become aware until too late to save himself? And, second, was his peril obvious to a reasonably careful man in the position of the motorman at a time when the latter had a reasonable opportunity to prevent the injury? That plaintiff was oblivious to his danger is manifest and we think all of the appearances combined to proclaim to the motorman the existence of a real danger and the inability of plaintiff, on account of his inattention, to save himself. In the first place the motorman must have realized that in going on at a speed of fifteen miles per hour—and he states that was the speed of the car—a collision would be inevitable unless he reduced speed. The initial movement of the team disclosed the purpose of plaintiff to drive along the track and the slow speed of his team and the visible directing of his attention to the wagon he was passing were outward obvious signs that he was neglecting his own safety and would be injured if the motorman made no effort to save him.

The evidence of plaintiff presents a clear case of "last chance" negligence and as we have said in other cases, such negligence, when existent, occupies the whole field of culpability and must be considered as the sole producing cause of the injury. The facts of this case are essentially different from the facts in the cases relied on by defendant, e. g., *Barnard v. Railway*, 137 Mo. App. 684, where the evidence dis-

closed that the plaintiff was not oblivious to the danger, nor was the actual danger apparent to the motor-man until it was too late to avoid the injury.

The court did not err in overruling the demurrer to the evidence.

Objection is offered to the first instruction given at the request of plaintiff on the ground that, in effect, it told the jury that \$6950, the maximum of the damages plaintiff could recover under his petition, would be a reasonable assessment of damages. Practically this is the same question ruled on in the case of *Stid v. Railway*, 236 Mo. 382, 139 S. W. Rep. 179; and following the decision in that case we hold the objection not well taken.

A second objection to the instruction is dismissed with the observation that the alleged error is shown by the verdict to have been harmless and, therefore, cannot be considered as a ground for disturbing the judgment.

The criticism of plaintiff's second instruction is answered in what we have said in ruling on the demurrer to the evidence. Complaint is made of the refusal of the court to give certain instructions asked by defendant but we find they were properly refused. They present the issue of contributory negligence as a defense to a cause of action solely based on a breach of defendant's humanitarian duty. This defense is not pleaded in the answer and might be dismissed on that ground, but we will add that contributory negligence that co-operated in the production of the perilous situation is no defense to the negligence of the defendant in failing to exercise reasonable care to discover the peril and avoid the injury.

We find no prejudicial error was committed in the rulings on the admission of evidence, nor does there appear to be any good ground for the point that the verdict was excessive. The case was fairly tried and the judgment is affirmed. All concur.

**ELIZABETH KLING, Respondent, v. A. H. GREEF
REALTY COMPANY, Appellant.**

Kansas City Court of Appeals, June 3, 1912.

1. **CONTRACTS: Breach: Recovery of Deposit.** Plaintiff sued to recover the amount deposited with a real estate agency as a partial payment of the purchase price of certain real estate under a written contract. The vendor acquired the land as the devisee of a citizen of New Hampshire who died intestate. No administration of his estate in this state was procured, and the land in question was therefore subject to the lien of debts of the testator not barred by the administration in New Hampshire. *Held*, that the doubt cast on the title by the fact that debts may be outstanding which may be enforced against the land is a substantial doubt that renders the title unmarketable and justified the rescission of the contract.
2. **MARKETABLE TITLE: Real Estate.** A marketable title is one which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would in the exercise of that prudence which business men ordinarily bring to bear upon such transactions be willing to accept.

**Appeal from Jackson Circuit Court.—Hon. Walter A.
Powell, Judge.**

AFFIRMED.

F. M. Hayward and C. S. McLane for appellant.

W. T. Latham for respondent.

JOHNSON, J.—This suit commenced in the circuit court of Jackson county, November 25, 1910, is for the recovery of two hundred dollars plaintiff deposited with defendant as a partial payment of the purchase price of certain real estate in Jackson county she purchased of William R. Dickey for whom defendant acted as agent in the sale of the land. It is alleged that Dickey failed to perform the contract of sale which

required him to deliver an abstract of title to plaintiff showing that he had a good title and to convey said title to plaintiff "free and clear from all liens and encumbrances whatsoever," and that on plaintiff's election to rescind the contract defendant refused compliance with her demand for the return of the deposit. The answer put in issue the allegation of a breach of the contract of sale. A jury was waived and after hearing the evidence the court rendered judgment for plaintiff in accordance with the prayer of her petition. Defendant appealed.

The facts of the case thus may be stated. On February 24, 1910, plaintiff and William R. Dickey entered into a written contract by the terms of which Dickey sold certain lots in Kansas City to plaintiff for the sum of thirty-six hundred dollars, payable as follows: "Two hundred dollars at the signing of this contract, the receipt whereof is hereby acknowledged by the seller and which is deposited with A. H. Greef Realty Co., as part of the consideration of the sale, the balance whereof is to be paid . . . on delivery of the deed as herein provided." The contract provided that within ten days from its date the vendor should deliver to the vendee "a complete abstract of title to said property from the United States Government to this date with certificates by competent abstracters as to taxes, judgments and mechanics' liens affecting said property. This buyer shall have ten days after such delivery of abstract to examine the same.

"If the title be good, the seller shall deliver for the buyer at the office of said A. H. Greef Realty Co., warranty deed, properly executed and conveying said property free and clear from all liens and encumbrances whatsoever, except as herein provided; the buyer shall then and there pay the balance, if any, of said cash payment, and deliver to the seller the note and deed of trust, if any, hereinbefore provided for,

and furnish the seller with insurance policy containing loss clause payable to the seller as his interest may appear; the buyer to accept assignment of insurance now in force, paying therefor unearned value prorated at present current rates.

“If the title is defective, the buyer shall specify the objections in writing to be delivered to the seller or the office of A. H. Greef Realty Co., within ten days after such delivery of the abstract; the seller shall have the defects rectified within thirty days from date of delivery of such objections, but in case such defects in the title cannot be rectified within that time, this contract shall be null and void, and the money deposited as aforesaid shall be returned to the buyer and the abstract returned to the seller.”

The deposit of two hundred dollars was made by plaintiff with defendant as required, an abstract of title was delivered to her and she handed it to her lawyer for examination. It appears that the vendor acquired the land as the devisee of Robert C. Dickey, a citizen of New Hampshire who died testate in that state in October, 1908. The abstract did not show an administration of his estate either in New Hampshire or in this state. In his letter on the title the attorney of plaintiff said: “From information which we have received outside of the abstract, it seems that Robert C. Dickey died some time ago in New Hampshire, leaving a will in which he devised his property, including property covered hereby, to a son; and that administration on the estate of Robert C. Dickey has been running in New Hampshire. This being true, a copy of the will, properly probated, should be duly recorded in this county, and a satisfactory showing made that all the debts of Robert C. Dickey have been paid. We are at a loss to know how this showing can be made as it has been stated to us that no administration has taken place in this county. However, we

shall deal with this question when a completed abstract of title is presented to us."

The abstract and letter were delivered to defendant and after the vendor had procured affidavits from New Hampshire relating to the subject of the administration of the estate of Robert C. Dickey, defendant returned the abstract with the affidavits to the attorney of plaintiff who, under date of April 16, 1910, wrote her the following letter:

"Since giving you our opinion, dated March 31, 1910, on the title to the north 12.5 feet of lot twelve (12) and the south 18¾ feet of lot thirteen (13), all in block four (4) of Chase's subdivision in Kansas City, Missouri, as shown by the abstract of title, certified by Norman and Robertson Abstract Company, on March 22, 1910, the abstract of title has been recertified to April 13, 1910, under certificate number 19562 by the same abstract company, and, with the affidavits of George A. Dickey, L. B. Bailey and F. A. Dickey, has been handed to us for our re-examination as to the title.

"William R. Dickey, who has contracted to sell the property to you, claims title as devisee under the will and as heir of Robert C. Dickey, who appears to have died in New Hampshire in or about the month of October, 1908. In our estimation, the title of William R. Dickey is unmerchantable for the reason that there has been no local administration on the estate of Robert C. Dickey, deceased, and hence any debts that he may owe locally are enforceable against the property.

"For the reason that the title is unmerchantable, you should demand from A. H. Greef Realty Company the sum of two hundred dollars, which you deposited with them at the time of the signing of the contract, and which under the contract was to be returned to you in case the title was not good."

No formal evidence of an administration of the estate in New Hampshire was procured but from one of the affidavits—that of the executor—it appears the will was probated, that there was an administration, that all of the debts proved against the estate had been paid and that the time for presenting demands had expired. No attempt was made by the vendor to furnish proof to plaintiff that Dickey, at the time of his death, owed no debts in Missouri or in other states than New Hampshire. Plaintiff's attorney testified:

"I recall that the investigation I made developed no debts, but it did not satisfy me that there could be none."

So far as the record discloses the lots which were the subject of the sale comprised the whole estate left by the decedent in this state.

First it is contended by counsel for defendant that in cases of this character "the purchaser has the burden of showing that the title is not such as is called for by the contract. It is not the duty of the vendor to show that the title is good." [Citing 29 Am. & Eng. Ency. Law, p. 620; Sawyer v. Sledge, 55 Ga. 152; Kimball v. Bell, 47 Kan. 757; Spring v. Sanford, 7 Paige (N. Y.), 550; Moser v. Cochrane, 107 N. Y. 35.]

That rule has application to cases where the only obligation imposed on the vendor by the contract is to execute and deliver a deed to the vendee conveying a good title and the deed is refused on the ground that the title is defective. In an action to recover purchase money paid in advance of the proffered delivery of the deed the vendee must show that the title was bad but where, as in the present instance, one of the duties imposed by the contract on the vendor is to deliver to the vendee in a stated time an abstract of title showing a good title in him, the vendee may rescind the sale on the ground of a breach of such condition and his burden of proof in an action to recover purchase money paid in advance may be discharged by

proof that the abstract furnished him by the vendor did not show a good title. [Austin v. Shipman, 141 S. W. Rep. 425, and cases cited.]

The question at issue here is whether or not the vendor did furnish the vendee an abstract of title showing a good title to the land vested in him. If he did, plaintiff was not justified in rescinding the contract and has no cause of action for the recovery of the deposit; if he did not, plaintiff acted within her rights in the rescission and is entitled to a return of the deposit.

The term "a good title" is synonymous with "a good marketable title" and the following definition of what constitutes a marketable title has received the approval of our Supreme Court in *Mastin v. Grimes*, 88 Mo. 478; *Mitchener v. Holmes*, 117 Mo. l. c. 205, and *Green v. Ditsch*, 143 Mo. 1.

"Every purchaser of land has a right to demand a title which shall protect him from anxiety, lest annoying, if not successful suits, be brought against him and probably take from him or his representatives land upon which money was invested. He should have a title which would enable him not only to hold his land, but to hold it in peace and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value."

There is no implied covenant that the title will be such as the vendee may be willing to accept or that his attorney may pronounce good and marketable. [Green v. Ditsch, *supra*.] And a mere suspicion against the title, or a speculative possibility that a defect in it might appear in the future, are not grounds on which the title may be denounced as unmarketable. As is said in one of the cases: "A purchaser is not entitled to demand a title absolutely free from all suspicion or possible defect. He may claim a marketable title, and that means a title which a reasonable purchaser, well informed as to the facts and their legal

bearings, willing and anxious to perform his contract, would in the exercise of that prudence which business men ordinarily bring to bear upon such transactions be willing to accept and ought to accept." [Todd v. Savings Institution, 128 N. Y. 636; Moser v. Cochran, 107 N. Y. 35; Hayes, Guardian v. Cemetery, 108 Mass. 400.] A reasonable doubt of a title, such a doubt as will render it unmarketable in the contemplation of the law, does not embrace mere shadows or possibilities, but probabilities. Moral, not mathematical, certainty that the title is good is all that may be demanded by the vendee. [Atkinson v. Taylor, 34 Mo. App. 442.]

Was the defect of a nature that would have prevented an ordinarily careful and prudent person in the situation of the vendee from consummating the sale though he was willing and anxious to take the property under the terms of the contract, is the real test question in all such cases. No reasonable person wishes to pay full value for property and have cause to feel uncertain about his title and the mere fact that no adverse claimant is at hand would not make his fear speculative or unsubstantial, if there is a reasonable likelihood that an unknown claimant may appear in the future and succeed in establishing a better right to the property. A vendee who buys a good title is entitled to receive what he buys and should not be compelled to assume risks of defects that cannot be classed as being common to all good titles. Certainly the existence of a reasonable probability that debts are outstanding, for the payment of which the land lawfully may be appropriated, is a defect that would cast a serious doubt on the title in the minds of reasonably careful and prudent persons who desired to purchase. In the present instance the fear of plaintiff, inspired by her attorney whose good faith is apparent, that the land might be assailed by creditors of the estate of Robert C. Dickey as one

which the facts disclosed in the abstract of title in no manner tended to allay.

It is true evidence was procured by defendant and attached to the abstract to the effect that an administration of the estate was in progress in New Hampshire, that the time for proving demands had expired and that all debts proved against the estate had been paid, but no proof was furnished that the decedent who owned property in this state did not owe debts in this State or debts in other states than New Hampshire. If he did, such creditors would not be precluded by the New Hampshire administration from proceeding in this state to appropriate the land in question for the payment of their debts. Every lawyer of experience in the practice of law relating to real property knows of instances of the delayed and unexpected enforcement in this state of demands against the estates of debtors who were non-residents of this state but who died owning property here. Indeed, section 188, Revised Statutes 1909, was designed, in part, to apply to just such cases and may be considered as a legislative recognition of their frequency. The doubt cast on the title by the facts that debts may be outstanding against the estate and that because of the omission of an administration of the estate in Missouri such debts may be enforced against the land, is a substantial doubt that renders the title unmarketable and justified plaintiff in rescinding the contract.

The judgment is affirmed. All concur.

ABRAHAM KALVER, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 3, 1912.

1. **NEGLIGENCE: Derailment.** Plaintiff sued for damages for injuries caused by an electric car leaving the rails and running into his horse and wagon and throwing them against him. He conducted a feed store and was in the act of putting a bale of hay into his wagon which was standing in front of his store when the accident occurred. *Held*, that the demurrer to the evidence was properly overruled.
2. **PLEADING: Derailment: Cause of: Prima Facie Case.** In an action for damages for injuries caused by the derailment of a street car it is only necessary in order to make a prima facie case of negligence to plead and prove that the injury was caused by the derailment of the car while the person injured was in the lawful use of a public street.
3. **NEGLIGENCE: Proximate Cause.** The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event and without which it would not have happened.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

AFFIRMED.

John H. Lucas and *Charles N. Sadler* for appellant.

H. J. Latshaw and *Jesse E. James* for respondent.

JOHNSON, J.—Plaintiff sued to recover damages for personal injuries caused by the derailment of an electric street car operated by defendant on Independence avenue in Kansas City. The petition alleges that plaintiff "was lawfully upon said Independence avenue and upon the south side thereof . . .

when one of defendant's eastbound electric cars was on account of the carelessness and negligence of defendant . . . allowed, permitted and caused to run off of the track and leave the track and to run over said street and the pavement thereon to or near the south side of said street and near which plaintiff was standing and working, thereby throwing, pushing and shoving said wagon and forcing said wagon with great force and violence against the sidewalk and building on the south side of said street thereby greatly injuring plaintiff." The answer is a general denial. The trial resulted in a verdict and judgment for plaintiff for eight hundred dollars. Defendant appealed.

Independence avenue runs east and west, is paved with asphalt and at the place in question is a business street. Defendant operates a double track street railway on this street, the south track being used for east bound cars. The distance between the south rail of this track and the curb is thirteen feet and eight inches and the distance from the curb to the property line nine feet and six inches. Plaintiff operated a feed store on the south side of the street. His one horse delivery wagon was standing in the street next the curb and plaintiff and his son were loading the wagon from the store. The front wheels of an eastbound car, running eight or ten miles per hour, suddenly jumped the track and turning southward ran to and on the curbing crashing into the wagon and horse just as plaintiff emerged from the store carrying a bale of hay. Plaintiff testified: "You see I have a hook in lifting a bale of hay. I got the bale to my face in front of the wagon. When the car struck I was just in the door stepping onto the sidewalk. The car pressed onto the wagon and the horse kicked me and I fell down with the bale of hay."

The horse was killed and the wagon was demolished. Whether the wagon, horse, bale of hay, or all three inflicted the injuries, which consisted of numer-

ous bruises and contusions, is not made clear in the evidence. The statement of plaintiff that the horse kicked him appears from all the facts and circumstances to be a mere supposition. The definite facts disclosed by his evidence are that the front end of the car struck the horse and wagon, throw them on the sidewalk and in turn one or both of them hit plaintiff who was on the sidewalk and injured him. Plaintiff did not allege and in his evidence in chief did not attempt to show the cause of the derailment. At the close of his evidence defendant requested the giving of a peremptory instruction but the request was refused and defendant then introduced evidence to the effect that the derailment was accidental. It was shown that there was no defect in the track or in the car and experts testified that sometimes derailments occur under such conditions. Over the objections of defendant plaintiff in rebuttal was permitted to introduce evidence tending to show that some of the stone or granite blocks set on each side of the rail had become loose and out of place, and that three of these blocks were lying on the surface of the street, and from the facts and circumstances appearing in this evidence the inference is reasonable that the derailment was caused by one of the front wheels striking and running over a broken part of one of these blocks, and that preceding cars that day had struck these obstructions but had not been derailed. The paving of which the granite blocks had been a part was laid by defendant and it was admitted at the trial that an ordinance was in force which required defendant to pave the street in between and eighteen inches on the outside of its tracks.

Counsel argue that the court erred in overruling the peremptory instructions asked by defendant at the close of plaintiff's evidence and again at the close of all the evidence. First it is insisted that the petition does not state a cause of action and that the defect is of such character that it was not cured by verdict.

The statute (section 1794, Revised Statutes 1909) provides that a petition must contain "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition."

"The whole theory of the practice act is that facts and not conclusions should be pleaded." [Humphreys v. Milling Co., 98 Mo. l. c. 552.]

"A petition must state all the facts which it will be necessary for the plaintiff to prove in order to make out a *prima facie* case." [Rogers v. Insurance Co., 186 Mo. l. c. 255.]

Plaintiff does not allege the facts on which he predicates his charge that the derailment of the car was caused by negligence of defendant. Defendant contends these facts were an integral part of his *prima facie* case and, therefore, should have been pleaded, while plaintiff argues that the only burden the rules of practice required him to carry in making out a *prima facie* case of negligence was to plead and prove that his injury was caused by the derailment of the car while he was in the lawful use of a public street.

We decided this precise point recently in the case of Baker v. Railroad, 142 Mo. App. l. c. 359, where we held that when a plaintiff showed he was on the public sidewalk where he had a right to be, and was injured by the derailment of a car running on a street railway track owned and operated by the defendant, he made out a *prima facie* case of negligence, and cast the burden on the defendant to show that the derailment was not due to negligence but to unavoidable accident or to some cause beyond its control.

The rule of *res ipsa loquitur* is not restricted to cases where the injury was inflicted during the relationship of carrier and passenger. As is held in McGrath v. Transit Co., 197 Mo. l. c. 104, the rule also applies to instances "where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or prop-

erty, and is so tortious in its quality as in the first instance at least to permit no inference save that of negligence on the part of the person in control of the injurious agency."

It is true there is no contractual relation between the operators of street cars and other users of the public streets as there is between carrier and passenger, nor does a street railway company owe to others using the streets the duty of exercising more than reasonable care for their safety, but the facts that the consequences of a derailment of a street car running at high speed along a busy thoroughfare generally are serious, that people are accustomed to act on the presumption that a car will not leave its track and that the cause of a derailment is a fact about which the company possesses vastly superior means of knowledge, induce us to hold, as we did in the Baker case, that the burden is on the defendant to show that the derailment was accidental and not due to negligence. The petition alleged all of the constitutive facts of the cause of action asserted.

What we have just said answers the objection of defendant that the evidence introduced by plaintiff relating to the cause of the derailment belonged to his evidence in chief and was not proper rebuttal. Plaintiff was not required to go into the issue of the cause of the derailment until defendant, in the discharge of its burden, had offered evidence tending to show the accidental origin of the injury. Then it became proper for plaintiff to meet such evidence by showing that the cause of the derailment was negligence.

Further defendant insists that the fact of the car being derailed by running over a loose cobblestone of itself is no proof of negligence. It was a question for the jury to determine whether or not the motor-man in the exercise of reasonable care should have discovered the obstruction in time to prevent the de-

railment. Other answers to the argument on this point might be given but this suffices for present purposes.

There is no merit in the position that we should hold as a matter of law that no direct causal connection is shown by the evidence between the negligence and the injury. "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have happened. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation. The negligence, which is the proximate cause of the injury authorizing a recovery, is not necessarily the immediate cause, but the culpable act in the chain of causation nearest the injury." [Boyce v. Railway Co., 120 Mo. App. 168.] Certainly defendant should have anticipated that a natural consequence of the derailment of a car and its subsequent running on the pavement might be a collision with another vehicle on the street and the injury of those in and about such vehicle. The horse and wagon were but an agency in the transmission of the dangerous force turned loose by defendant's negligence and were not an independent and intervening cause of the injury.

The demurrer to the evidence was properly overruled.

Objections to the rulings of the court on evidence have been considered and are pronounced ill founded. The point that the court erred in not granting a new trial on the ground of newly discovered evidence was not properly preserved in the trial court and, therefore, is not before us for determination. We cannot say the verdict is excessive. We have a strong suspicion that plaintiff magnifies trifling bruises into a serious injury, but his evidence is substantial and the assessment of damages is well within its substance.

The credibility of plaintiff and his witnesses was an issue for the jury as was the weight of their evidence. There is no substantial error in the record and the judgment is affirmed. All concur.

CHARLES C. SMELTZER, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY,
Appellant.

Kansas City Court of Appeals, June 3, 1912.

1. **STREET RAILWAYS: Humanitarian Rule: Personal Injury.** The humanitarian rule is a doctrine of the law, which, in one of its phases, casts liability upon a negligent street railway company whenever its servants, operating its car on a public street, see, or by the exercise of ordinary care could see, a street traveler in danger from the going car, and thereafter fail to exercise ordinary care in the use of means at hand to avoid injuring him, when such ordinary care, having regard to the safety of passengers, could have saved the traveler.
2. ———: ———: ———: **Contributory Negligence: Right to Recover.** S was driving a covered milk wagon along the west side of a street and desiring to cross to the east side he stopped and looked back for a street car and saw one approaching, 150 feet away, at a speed of twelve or fifteen miles per hour. He, notwithstanding this, attempted to cross, and was struck by the car. There was evidence that the street car was seventy-five feet away when the horse got on the track and that the car could have been stopped, by use of ordinary care, within thirty-five or forty-five feet. It was held that S was guilty of contributory negligence, but that he could recover damages under the humanitarian rule.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

AFFIRMED.

John H. Lucas and Pratt & Marks for appellant.
Oldham & James for respondent.

ELLISON, J.—Plaintiff's action was instituted to recover damages alleged to have resulted from one of defendant's street cars colliding with his wagon and throwing him to the street. The judgment was for him in the trial court.

The action is based on the humanitarian rule. The controlling facts are few and easily understood. Plaintiff, at nine o'clock, p. m., was driving a milk wagon, with an enclosed top, south, on the west side of Troost avenue north of Thirty-third street, in Kansas City. When he reached a point about seventy-five feet north of Thirty-third street, intending to cross over defendant's tracks to the east side of the street, he put his head out of the open door of his wagon and looked back north for a car. He saw one, 150 feet away, approaching at a speed of twelve or fifteen miles an hour. Notwithstanding this, he started east across the street, "angling a little." His horse and the greater part of the wagon had cleared the west track, when the car struck the rear part, and inflicted the injury of which he complains.

When plaintiff's horse got upon the west track, the car was seventy-five feet away; necessarily it was in plain view of the motorman, if he was looking ahead. There was evidence that the car could have been stopped within a distance of thirty-five or forty-five feet.

Plaintiff was guilty of contributory negligence in attempting to cross the track, instead of waiting for the car to pass by. But his negligence and the imminence of his peril were apparent to the motorman when he was such a distance away as to have had ample time to have stopped the car by the exercise of ordinary care. That is, as we have just said, the motorman saw the peril of the situation, as the evidence tended to prove, when he was seventy-five feet away and when he could have stopped within thirty-five or forty-five feet. [Morgan v. Wabash Ry. Co., 159 Mo. 262; White v. Ry. Co., 202 Mo. 539, 563; Ellis v. Met. St.

Ry. Co., 234 Mo. 657.] In the last case Judge LAMM, speaking for the Supreme Court, says the humanitarian rule "is a doctrine of the law, which, in one of its phases, casts liability upon a negligent street railway company whenever its servants, operating its car on a public street, see, or by the exercise of ordinary care could see, a street traveler in danger from the going car, and thereafter fail to exercise ordinary care in the use of means at hand to avoid injuring him, when such ordinary care; having regard to the safety of passengers, could have saved the traveler."

Continuing, the judge states that: "While negligence always has misfortune for a companion, yet such traveler does not alone bear the burden in the law of that misfortune when he inadvertently goes into a place of danger from a street car so far ahead of it that those who control it may, under the circumstances and conditions given in the rule, save his limb or life. The joint right in the carrier under its easement and franchise, and in the traveler under the easement in the public, to use a public street, coupled with correlative and present duties of all those who use the street to each other, result in the above sensible and settled working theory for the administration of justice between the street traveler and the carrier."

Remark is made in that case on the seeming conflict in the authorities in this state. From citations made to us by defendant, we too, can see the embarrassment in undertaking to reconcile all the cases. But the above announcement clearly states the rule and its justness.

There was an objection made to plaintiff's being allowed to show that loss of sexual power resulted to plaintiff. The point is not briefed, nor is it referred to in the summary of "points and argument." It is sufficient to say that we think the allegations of the petition justified admitting the evidence.

What we have said disposes of complaint as to instructions refused for defendant. We think amendments made to some of them, which were refused as offered, not fairly subject to criticism. Objection is made to plaintiff's first instruction as assuming matters in dispute. We think the objection not well taken. The instruction is somewhat lengthy, but not substantially faulty.

It is next said that there was no evidence that the car could have been stopped, or the speed slackened sufficiently to have avoided striking plaintiff. We however find, as we have already stated, that there was.

An examination of the record, in connection with defendant's argument and brief, does not show that we should interfere, and hence we affirm the judgment. All concur.

MAMIE F. ROURKE et al., Respondents, v. METROPOLITAN STREET RAILWAY COMPANY et al., Appellants.

Kansas City Court of Appeals, June 3, 1912.

APPEALS: Jurisdiction: Supreme Court: Courts of Appeals: Subsequent Appeals. Where a plaintiff claimed an amount in his petition exceeding the jurisdiction of the Court of Appeals, and was defeated in the circuit court, the Supreme Court has jurisdiction of his appeal, and if the case be remanded for a new trial, in which plaintiff recovers a sum within the jurisdiction of the Court of Appeals, the Supreme Court will nevertheless have jurisdiction of the defendant's appeal. The statute contemplates that a case once properly appealed and heard by the Supreme Court, that court has jurisdiction of all subsequent appeals regardless of amount.

Appeal from Jackson Circuit Court.—Hon. Thomas J. Seehorn, Judge.

TRANSFERRED TO THE SUPREME COURT.

John H. Lucas and E. R. Morrison for appellants.

Reed, Yates, Mastin & Harvey for respondents.

ELLISON, J.—Plaintiffs' action was instituted to recover damages to their property at Eighth and Main streets, in Kansas City, alleged to have accrued to them by reason of the building of an elevated railway structure along Eighth street. The judgment in the trial court was for the plaintiffs.

This is the second appeal of the case. The first was taken to the Supreme Court by the plaintiff and will be found reported in 221 Mo. 46, where a full statement of the facts will be found, and to which we refer.

The first appeal being by the plaintiffs and their claim being for a sum beyond the jurisdiction of the Court of Appeals, the appeal was, for that reason, within the jurisdiction of the Supreme Court. At the last trial plaintiffs were successful, but in an amount within the jurisdiction of this court, and defendant took its appeal to this court. But the case having been first determined by the Supreme Court, that court, under the provisions of sections 1 and 2, page 190, is finally determined, notwithstanding the amount is within the limit of our jurisdiction generally.

To the suggestion that the act of 1911 includes only cases pending in the Supreme Court at the date of the act, we refer to the second section, where actions then pending in the *circuit court* which had been formerly in the Supreme Court, are referred to. It follows that jurisdiction of this appeal is, under the terms of the act, in the Supreme Court, and the cause will be transferred to that court. All concur.

MARY C. HOOPER, Appellant, v. STANDARD LIFE
& ACCIDENT INSURANCE CO., Respondent.

Kansas City Court of Appeals, June 3, 1912.

1. **INSURANCE: Accident Policy: Evidence: Res Gestae.** Where in an action on an accident policy it appeared that a man was stricken with apoplexy in a street car, from which death ensued, and the question was whether the apoplexy was caused naturally or by a fall in the aisle of the car, it was shown that he was assisted out of the car and carried to his house nearby and laid on a couch; his arm was bruised and pained him. The court refused to permit a witness for the plaintiff to testify as a part of the *res gestae*, that after he was put on the couch and within thirty minutes after being stricken, he stated that he fell in the car and hurt his arm. *Held*, not error.
2. ———: ———: **Disease: Accident: Direct Cause: Instructions.** Even though one is so diseased that death will shortly ensue, yet if the immediate cause of his death is an accident, and though he would not have died but for his diseased condition, liability on an accident policy of insurance is incurred. And instructions for the defendant which practically cut off such consideration by the jury are erroneous.
3. ———: ———: **Instructions: Motion for New Trial: General Statement of Error.** If several instructions are given for a defendant and exception taken to giving a part of them, it is sufficient to allege, generally, in the motion for new trial, that "The court erred in giving erroneous and improper instructions," without designating specifically which ones are erroneous.

Appeal from Jackson Circuit Court.—*Hon. James E. Goodrich*, Judge.

REVERSED AND REMANDED.

Fyke & Snider for appellant.

Warner, Dean, McLeod & Timmonds for respondent.

ELLISON, J.—Plaintiff is the widow of William H. Hooper, who died on the 31st of March, 1909. He

left what is known as an accident policy, issued to him by the defendant company, for the sum of two thousand dollars, payable to plaintiff. She brought this action alleging the death to have resulted from an accident. The death was not disputed, but defendant denied it was caused by an accident. The judgment in the trial court was for the defendant.

It appears that deceased who, at his death was about fifty-five years of age, was a large man, weighing more than two hundred pounds, and in appearance was robust, strong and healthy. But, as shown by post-mortem examination, he was, in fact, diseased in brain, heart and arteries, and the immediate cause of his death was cerebral hemorrhage.

He was an employee in a large mercantile establishment in Kansas City, and on the evening of the 23rd of March, 1909, about dark, was riding to his home in a street car which passed his house at Twenty-Seventh street and Brooklyn avenue. As the car came near to the corner, and while yet in motion, he got up from his seat, presumably to alight, when he either sank or fell to the floor. Passengers came to his assistance, helped him from the car and carried him into his house and laid him on a sofa. He lingered about a week, when he died on the 31st as stated. The passenger who first went to his assistance spoke to him and he did not answer. He could not walk, but as they got to the door of the car with him he said he could not use one of his legs.

Plaintiff's position is that he accidentally fell in the car, whereby he ruptured a blood vessel in the brain and thereby died. Defendant insists there was no accident, but that deceased was suddenly stricken with apoplexy, whereby he sank to the floor of the car, and thereafter died from natural cause.

Notwithstanding Hooper was fatally diseased in heart and brain, and notwithstanding his death was from apoplexy, yet if he accidentally fell in the car and

ruptured a blood vessel, which caused the apoplectic stroke, his death would be accounted as accidental. For, if a man is so afflicted that he will die from such affliction, within a few hours, yet if by some accidental means his death is caused sooner, it would be a death from accident.

It was therefore an important question of fact whether he accidentally fell in the car, thereby causing a rupture of a blood vessel, whereby apoplexy resulted. There was evidence tending to prove a rough or sunken place in the street railway track at the point where he was seen to arise from his seat in the car, which caused it to "lurch" in passing over, and there was evidence that he fell down, as distinguished from sinking down, that he fell across the aisle striking a seat on the opposite side. His arm was hurt at the elbow and showed a bruised place, which gave him pain. In this condition of the case, there was an offer of proof by plaintiff, as a witness in her own behalf, as a part of the *res gestae*, that after deceased had been carried into his house and laid on the sofa and "within thirty minutes after the occurrence in the car, he complained of his arm hurting him, and stated that he fell in the car and hurt his arm." On defendant's objection, the offer was refused by the court.

The whole of what happens or transpires, that is, the *res gestae*, does not always appear to the eyes of witnesses. Sometimes words spoken by an actor in the transaction during its performance are a part of it and serve to explain it. When an act is immediately accompanied with the words, it is easy to see that it takes both to make up the whole *res gestae*. It is when there is appreciable time between the thing which has happened and the words which are spoken of it, that difficulty has arisen. The thing to avoid is the allowance of a made-up or a colored or highly exaggerated story; for, ordinarily, what a man says in his own favor ought not to be allowed as evidence against his

adversary. With this in view, courts have not always allowed the matter of a short time intervening to prevent what one has said of an occurrence being received in evidence, where the circumstances connect the two and also show fabrication to be highly improbable. In a leading case in this state, which seems not to have been questioned, it is said by WAGNER, J., that: "Where a declaration is made by a deceased person coterminously, or nearly so, with a main event, by whose consequence it is alleged he died, as to the cause of that event, though generally the declarations must be coterminous with the event, yet where there are any connecting circumstances, they may, even when made some time afterward, form a part of the whole *res gestae*." [Brownell v. Pacific Ry. Co., 47 Mo. 239.]

In that case the time of Brownell's declaration is not given any more definitely than as "shortly after the accident," and again as "immediately after the accident, when Brownell was restored to consciousness." In State v. Gabriel, 88 Mo. 631, 639, it is said that there are "no limits of time within which the *res gestae* can be arbitrarily confined," and that "they vary in fact with each particular case." And again, that even though made after the occurrence, "where such statements were plainly not self-serving, but the usual and natural utterances," they are competent. In State v. Martin, 124 Mo. 514, a man was stabbed and cried out, so that a man ran to his relief and then ran a block and a half for a physician, who he found could not come. He then ran back and found a policeman with the wounded man. The policeman, in the presence of this man, then asked him who did it, and was told. The court held the declaration admissible and called attention that the answer was given in the presence of the man who first went to his relief, remarking that "No sensible man would reject such evidence in his own affairs."

Within the limit of these general statements of the law, there is much basis for plaintiff's claim that her offer of proof should have been received. While deceased was not unconscious after the time he was taken to the end of the car, his condition was such while being carried to his house and for some time after he was placed upon the couch, as to appear unreasonable that he could have fabricated a statement as to his fall, with a view to placing himself in position for a claim on this accident policy.

But the application of the law which the Supreme Court has made, to certain facts, we think justified the trial court in rejecting the offer. The case of *Leahey v. Cass Ave. & F. G. Ry. Co.*, 97 Mo. 165, is like the case at bar in material respects. There, a boy eleven years old, either stepped off a moving street car or was frightened off by the driver. He fell under the wheel and was fatally injured. He was carried to a near-by house and laid on a couch and within ten minutes of the accident, in answer to a question as to how he came to be hurt, said the driver kicked him off the car step. Testimony as to this declaration was held inadmissible.

That case practically, is affirmed in *Ruschenberg v. Ry. Co.*, 161 Mo. 70; *Barker v. Ry. Co.*, 126 Mo. 143; *State v. Hendricks*, 172 Mo. 654, 672; and *Redmon v. Ry. Co.*, 185 Mo. 1.

We regard plaintiff's exception to the two following instructions given for defendant, as well taken, viz.:

"3. The court instructs the jury that if you shall believe from the evidence that Mr. Hooper was stricken with apoplexy while riding in the street car, and that he was so stricken either while sitting in his seat or in an attempt to arise therefrom, and that such apoplexy caused his death, then it is your duty to return a verdict in favor of the defendant.

"4. If you shall believe from the evidence that the death of Mr. Hooper was caused by apoplexy resulting from a diseased condition of his body, it is your duty to return a verdict in favor of the defendant, regardless of all other questions in the case."

These instructions, when applied to the evidence, were practically peremptory to find a verdict for defendant. It was conceded all around that deceased was stricken with apoplexy while riding in a street car, from which he afterwards died. But plaintiff's theory is that either while in the act of arising from his seat, or after he had arisen, he accidentally fell, causing the apoplexy. The peculiar nature of the evidence we think requires, in fairness to plaintiff, that a qualification be made to No. 3, to the effect that he must be found to have been stricken *before* he fell.

So it is clearly necessary to qualify No. 4. Deceased, no doubt, died from apoplexy caused by a diseased condition. That is, he would not have died but for that condition, and therefore, under the terms of the instruction, the verdict must be for defendant. And yet, according to the evidence for plaintiff, if the accident of his falling had not happened, he still would not have been stricken with apoplexy. The effect of the instruction was to cut out plaintiff's theory of her case; especially when there was added the words, "regardless of all other questions in the case."

Defendant challenges plaintiff's right to question those instructions on the ground that there were other instructions also given, to which exception was taken at the time, and these now objected to where not mentioned as errors in the motion for new trial. The motion for new trial does not mention them specially, but does generally. The allegation in the motion is that: "The court erred in giving erroneous and improper instructions to the jury on the part of the defendant." That is a sufficient complaint under the practice in Missouri, which differs in that respect from

Wasmer v. Railroad.

many other states: [See *Weber v. Cable Ry.*, 100 Mo. l. c. 205, 206; *State v. Noland*, 111 Mo. l. c. 493; *Chapman v. Eneberg*, 95 Mo. App. l. c. 134.]

The judgment will be reversed and the cause remanded. All concur.

DELBERT WASMER, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 3, 1912.

1. **NEGLIGENCE: Injured at Crossing.** Plaintiff sued for damages for injuries to his wife who was struck by a train when she was crossing the railroad track, where it intersected a public street. Under the facts and circumstances shown in evidence, it is held that plaintiff could not recover.
2. **EVIDENCE: Admission of Attorney: Opening Statement.** Statements made by an attorney at the opening of the trial as to what he expects to prove, do not amount to admissions, they bind no one.
3. **NEGLIGENCE: Public Crossing: Unlawful Rate of Speed.** A pedestrian, who, while in a place of safety at a public street crossing, looked and saw a train approaching at thirty or thirty-five miles an hour, but took the chances and attempted to cross in front of it, is not entitled to recover, notwithstanding the train was running at an unlawful rate of speed.

Appeal from Jackson Circuit Court.—*Hon. James H. Slover*, Judge.

REVERSED.

Martin S. Clardy and *Edward J. White* for appellant.

H. J. Latshaw and *Jesse E. James* for respondent.

BROADDUS, P. J.—This is a suit to recover damages the plaintiff alleges he sustained by reason of an injury inflicted upon his wife by the negligence of the defendant. The plaintiff's wife was struck and injured by one of defendant's freight trains on the 17th day of March, 1908, at or near Crystal avenue in Kansas City, Missouri.

The plaintiff in his petition alleges in one count that the injury was the result of defendant's failure to comply with an ordinance of the city regulating the speed of trains passing over its streets. In the second count of his petition the plaintiff seeks to recover on the humanitarian theory that defendant's engineer saw or could have seen his wife on the defendant's track in time to have avoided injuring her had he exercised ordinary diligence.

The cause was submitted to the jury under the humanitarian doctrine. The jury returned a verdict for plaintiff for \$3750. From the judgment rendered on the verdict defendant appealed.

The plaintiff's wife was struck at a grade crossing of Fifteenth street and Crystal avenue. Fifteenth street is one of the chief thoroughfares of Kansas City and is much used by vehicles and pedestrians, and trains are constantly passing over the crossing where the injury occurred. The defendant's train was going north. Plaintiff's wife was approaching the defendant's tracks at the crossing on the sidewalk on the north side of Fifteenth street. At a point about seventy feet west of the main track where she was injured she spoke to a Mr. Cassell as she passed him, who was going in the same direction, but had stopped to talk to some one. Cassell, who was a witness in the case, testified that she continued on her walk and when he last saw her she was from five to ten feet from the defendant's main track. She was struck by the engine and knocked to the east side of the track. In her strug-

gle she came in contact with the train and was struck the second time.

A witness by the name of Glasscock testified that the train in question, when he first saw it, was six or eight hundred yards down the track. It seems that just then he went into a water closet and when he came out he noticed the engine going by—the engineer was looking back with his hand on the throttle. He then saw the woman, plaintiff's wife, lying close to the track; that he started after her, but just before he reached her she was "coming to—flounced around" and the "grease box of the wheels struck her;" that he grabbed her by the foot and pulled her away. It was the opinion of this witness that when he first saw the train coming its rate of speed was eight or ten miles an hour, that it was the opinion of this and all the other witnesses that at the time it struck plaintiff's wife it was going at the rate of from eighteen to thirty miles an hour. All the other witnesses also testified that the train could be seen for a long distance, while approaching, by a person near the track. The plaintiff's wife seems to have been struck after she had gotten nearly across the tracks, as she was found on the east side. It was shown that there was a station near the point in controversy, and that the train gave the whistle as it approached it. But the evidence went to show that there was no signal given just before the plaintiff's wife was struck; and that there was no slackening of the speed of the train.

The evidence showed that the speed of the train could have been slackened, at the rate of speed it was going, in fifty feet, and reduced to one-half its speed in 150 feet. Cassel stated that he did not attempt to pass before the approaching train because he did not think he had time to do so. Plaintiff's wife, it seems, was in a hurry to get home to her baby. There can be no doubt but what she saw the on-coming train and knew, as every one else did, that it was coming

at a somewhat rapid rate of speed. There was no evidence introduced on the part of defendant.

After plaintiff's counsel had made his statement to the jury the defendant moved the court to direct a verdict for it on the ground that, admitting the statement to be true, the plaintiff was not entitled to recover. The court overruled the motion.

During the trial plaintiff introduced his wife, and, over the objection of defendant, offered to prove certain facts pertaining to the manner in which she was injured. She was not allowed to testify.

Numerous errors are assigned by the appellant as grounds for a reversal of the judgment. It is insisted that: "The court should have directed a verdict for defendant on the opening statement of plaintiff's counsel to the jury, for the reason that the plaintiff's counsel in his opening statement to the jury, stated a case of contributory negligence on the part of plaintiff's wife, sufficient to prevent a recovery, and upon the facts stated by plaintiff's counsel, the humanitarian doctrine would not apply to this case." The appellant relies on the ruling in *Pratt v. Conway*, 148 Mo. 291, to sustain its position, but we do not believe it does. It is there held the admission of the existence of certain facts made by the counsel in the case was binding on his client, and such is the general rule. But the question here is far different. The statement of plaintiff's counsel did not amount to an admission of the facts stated. It was only a statement of what the plaintiff's counsel expected to prove to sustain his cause of action. In such instances the rule is that: "Statements made by an attorney at the opening of the trial as to what he expects to prove, do not amount to admissions, they bind no one." [*Russ v. Ry. Co.*, 112 Mo. 45; *Fillingham v. Transit Co.*, 102 Mo. App. 573.]

Appellant's principal contention is that plaintiff was not entitled to recover on the testimony. If we

are to assume that, because it was shown that the engineer could have seen plaintiff's wife as she approached the track, and that the engineer could then have slackened the speed of his train in time to have prevented the engine from striking her before she got across the track, the defendant was guilty of violating the humanitarian rule, then plaintiff was entitled to recover. But we do not think these facts bring the case within the rule. The mere fact that a person is seen to approach a railroad track at a public crossing while a train is approaching is no evidence that he is going to place himself in danger if he can see and hear the train. On the contrary, the expectation is that he will stop until the train passes. But if he should continue, heedless of the danger, and get upon the crossing and get injured, it is his fault and he must suffer the consequences. This is the general rule. But the law has wisely provided that notwithstanding a person may go upon a public crossing while a train is approaching and thus be guilty of negligence, yet, if the engineer sees or by the exercise of reasonable diligence can see that the person is unaware of his danger, it is his duty to stop or slacken the speed of the train so as to prevent striking him, if he has time to do so by the exercise of reasonable diligence.

Tested by this rule, it seems to us plaintiff has failed to make out a case. There is no doubt but what the defendant's engineer saw the plaintiff's wife as she approached the track and when she was from seven to ten feet from it. But how was he to know that she would not stop before she got onto the tracks? He had the right to conclude that she would. If she approached nearer and there was anything in her conduct to apprise him of the fact that she did not know of her danger he should have acted promptly to have saved her. But no one saw her afterwards. All we know is that she continued to advance and was struck after she had gotten almost entirely over the tracks

and out of danger. Just how far the train was away when she was about to enter upon the tracks no witness could tell, as none saw her at that time. Notwithstanding the train could have been checked sufficiently in fifty feet at the rate of speed it was going to have avoided striking the woman, the evidence is lacking to show where the train was at the time she was about to enter upon the tracks, whether fifty feet, or more or less. If less than fifty feet, the engineer could not have avoided striking her. Also there is nothing to show at what rate of speed the woman was traveling. Persons on such occasions usually go rapidly, and the most reasonable supposition is that plaintiff's wife was aware of the approaching train and its near proximity, and that she moved rapidly in her effort to pass over the tracks. This view of the case is strengthened from the fact that she told some one that she must hurry and get home to her baby.

The plaintiff's attorney seemed to have realized the uncertainty of the cause and, for the purpose of strengthening it, offered the wife as a witness to testify to the manner in which she was injured.

It seems to us the case falls within the rule applied in *Laun v. Railroad*, 216 Mo. 563, where it is held that the pedestrian, who, while he was in a place of safety at a public street crossing, did look and saw a train approaching at a speed of thirty or thirty-five miles an hour, but took the chances, and hurrying attempted to cross in front of it, was not entitled to recover, notwithstanding the train was running at a unlawful rate of speed. It is there said that a railroad track is a signal of danger, and a pedestrian cannot carelessly attempt to cross the same at a public crossing without using some care for his own protection. As the plaintiff was not entitled to recover upon his evidence there is no necessity for considering the other assignments of error. Reversed. All concur.

W. L. WAYLAND, Respondent, v. WESTERN LIFE
INDEMNITY COMPANY, Appellant.

Kansas City Court of Appeals, June 17, 1912.

1. **LIFE INSURANCE: Assessment Company: Forfeiture: Illegal Assessments.** The policy issued to a member by an assessment company cannot be declared forfeited by reason of the failure of the member to pay assessments illegally levied. The right to assess is strictly construed and it can only be exercised when the conditions prescribed in the contract exist.
2. ———: **Abandonment of Policy: Intention.** The test of an abandonment of rights under a life insurance policy is the existence of an intent to abandon and the presumption is that the owner of property intends to preserve his rights.
3. ———: **Unlawful Assessments: Forfeiture.** Plaintiff was named as one of the beneficiaries in a policy issued to one Wayland who failed to pay two assessments levied in October, 1905. Thereupon his membership was declared forfeited and he made no effort to be reinstated. No notice of any subsequent assessments was given him, and in October 1908, he died. The interest of the other beneficiaries was assigned to plaintiff. The unpaid assessments were made when unnecessary under the provisions of the contract and therefore were illegal and void, furnishing no legal basis for a forfeiture.
4. ———: **Forfeiture: Subsequent Assessments.** The attempted exaction of illegal assessments and the declaration of the insurer that it would not continue in contractual relations with the assured except on his submission constituted a breach of the contract that relieved the assured of the obligation to pay or tender payment of subsequent lawful assessments.

Ellison, J., Dissenting.

Appeal from Chariton Circuit Court.—*Hon. John P.
Butler*, Judge.

AFFIRMED.

CERTIFIED TO THE SUPREME COURT.

Thomas J. Graydon, W. M. Williams and E. F. Ware for appellant.

Good faith to his fellow members, who must be assessed to pay his policy if such payment is required, demanded that if he intended to retain his membership and to assert the invalidity or irregularity of the forfeiture of his membership, that he bring it, within a reasonable time, to the attention of the company. He could not sit idly by, apparently acquiescing in the forfeiture of his membership, while others were paying dues and large assessments, and, at the end of three years, have his beneficiaries placed in a better position than those of the members who had borne all of the burdens of the company. *Glardon v. Supreme Lodge*, 50 Mo. App. 58; *Miller v. Grand Lodge*, 72 Mo. App. 505; *Purdy v. Life Assn.*, 101 Mo. App. 107; *Lavin v. Grand Lodge*, 112 Mo. App. 1; *Bange v. Supreme Lodge*, 128 Mo. App. 475; *McGeehan v. Insurance Co.*, 131 Mo. App. 420; *Stewart v. Supreme Council*, 36 Mo. App. 333; *Lone v. Ins. Co.*, 74 Pac. (Wash.) 689; *State ex rel. v. Grand Lodge*, 78 Mo. App. 556.

It is no answer to the defense of abandonment to say that an abortive effort had been made to forfeit his rights before he determined to quit the company. *Glardon v. Supreme Lodge*, 50 Mo. App. 1; *Bange v. Supreme Lodge*, 128 Mo. App. 475; *Lavin v. Grand Lodge*, 112 Mo. App. 1. The insured put his refusal to pay the assessments on the ground of the financial condition of the company, as he understood it, and because his policy was issued by the association under its original name which it subsequently changed. He never at any time set up or claimed that the assessments were invalid or brought any such objection to the attention of the defendant, its officers, agents or his fellow members, although he lived for more than three years after the assessments were made. It is too late for the plaintiff to set up a different ground

of objection to the assessments and one which the insured did not make for himself. *Ins. Co. v. Burnham*, 141 Fed. 842; *Roth v. Ins. Co.*, 162 Fed. 284; *Pfingston v. Grand Lodge*, 83 N. E. (Ind.), 254.

Lamb & Lamb and Busby Bros. & Withers for respondent.

The act of making an assessment is a ministerial, and not a judicial one. Therefore no presumption can arise in favor of the regularity or legality of assessments, and it is an affirmative matter, both of pleading and evidence, necessary to establish a forfeiture for non-payment of an assessment; and the assessment should appear to have been made in the manner, mode and in conformity with the authority given, and for a proper purpose. 2 *Joyce on Ins.*, sec. 1310; *Stewart v. Grand Lodge*, 46 S. W. 579; *Murphy v. Fund Ass'n*, 114 Fed. Rep. 404; *Ins. Co. v. Hyde*, 101 Tenn. 405; *Benjamin v. Life Ass'n*, 79 Pac. Rep. 517; *Ins. Co. v. Geise*, 49 Mo. 332; *Miles v. Life Ass'n*, 84 N. W. Rep. 159; *Society v. Helburn*, 85 Ky. 1; *Burchard v. Travelers Ass'n*, 139 Mo. App. 606. The question here is one of forfeiture and no liberal construction or intendment will be indulged in favor thereof. *Bagley v. Grand Lodge*, 131 Ill. 498; *Sup. Council v. Haas*, 116 Ill. App. 587; *Hannum v. Waddill*, 135 Mo. 160; *McFarland v. Accident Ass'n*, 124 Mo. 217; *Seibert v. Chosen Friends*, 23 Mo. App. 268; *Grewell v. National Council*, 104 S. W. 884; *Ins. Co. v. Geise*, 49 Mo. 329; *Insurance Co. v. Comfort*, 50 Miss. 662; *Burchard v. Travelers Assn.*, 139 Mo. App. 606; *Roseberry v. Benevolent Assn.*, 121 S. W. 785; 2 *May on Ins.* (4 Ed.), sec. 557; 2 *Joyce on Ins.*, sec. 1310. The burden of proof was upon appellant to establish the alleged default by competent proof and to show that the assessment was regularly levied in accordance with its laws providing therefor. 3 *Cooley's Ins. Briefs*, 2348-2349; *Assn. v. Schauss*, 148 Ill. 304; *Sup. Council v. Haas*, 116 Ill. App. 587; *Mulroy v. Knights of Honor*, 28 Mo.

App. 463; *Burchard v. Travelers Assn.*, supra. The assessment was not valid because there were sufficient funds on hand belonging to the death fund to not only pay in full the maximum loss of \$5000, but to pay in full both losses for which said assessments were levied. *Craig v. Indemnity Co.*, 136 Mo. App. 10; *Ins. Co. v. Woolen Factory*, 1 Ohio Dec. 577, 10 West L. J. 466. Proof that there was sufficient money belonging to the death fund on hand to avoid the necessity of a levy though concealed by having been wrongfully placed in another fund is such matter in rebuttal. *Bagley v. Grand Lodge*, 131 Ill. 498; *Sup. Council v. Haas*, 116 Ill. App. 587; *Hannum v. Waddill*, 135 Mo. 160; *Craig v. Indemnity Co.*, 136 Mo. App. 5. The assessments not being valid because not "needed" a forfeiture cannot be based upon a failure to pay them. 3 *Cooley's Ins. Briefs*, 2348-2349; *Craig v. Indemnity Co.*, supra. The defendant having fraudulently dissipated the funds of the insured and forfeited his policy in an oppressive, arbitrary and fraudulent manner, it was not incumbent on the insured to tender further premiums or attempt to be reinstated, when he had every reason to believe such action would be futile. *Pilcher v. Insurance Co.*, 33 La. Ann. 222; *Insurance Co. v. Smith*, 44 Ohio St 156; *Grand Lodge v. Scott*, 93 N. W. 190; 2 *Joyce, Insurance*, 1123; *Shaw v. Ins. Co.*, 69 N. Y. 286; *Ins. Co. v. Ben. Soc.*, 181 Pa. St. 448; *Agnew v. A. O. U. W.*, 17 Mo. App. 254; *Insurance Co. v. Gorman*, 74 Ga. 57. See, especially, 3 *Cooley's Briefs on the Law of Insurance*, 2330-2348. There was no evidence of a voluntary abandonment of the policy by the insured in this case. *Wanek v. Supreme Lodge*, 84 Mo. App. 185; *Packwood v. Ins. Co.*, 9 Mo. App. 469; *Ins. Co. v. Wright*, 126 F. 82; 3 *Cooley's Briefs*, 2398; *Ins. Co. v. Berwald*, 76 S. W. 492. Mere silence on the part of the insured will not establish the fact of abandonment or acquiescence in an unlawful forfeiture. *Guetzkow v. Insurance Co.*, 105 Wis. 448;

Purdy v. Life Assn., 101 Mo. App. 109; Smith v. Roach, 59 Mo. App. 117; Spurlock v. Sproule, 72 Mo. 509; Bostwick v. Fire Department, 49 Mich. 513; Lodge v. Hubbell, 2 Strob. L. (S. C.) 457; Thompson on Insurance, 931; 3 Cooley on Ins., 2398.

JOHNSON, J.—This is an action on a policy of life insurance issued by an insurance company organized under the laws of Illinois and authorized to do business in this state as an assessment company. The policy was issued to John H. Wayland of Salisbury, Missouri, June 24, 1889, who paid all dues and assessments until October 12, 1905, when he failed to pay two assessments (numbered 303 and 304) levied to pay two death losses of five thousand dollars each and thereupon defendant declared his policy forfeited. He made no effort to be reinstated, paid no further dues and assessments and on October 28, 1908, died at his home in Salisbury, leaving a widow and three children who were the beneficiaries named in the policy. Plaintiff is one of the beneficiaries and, on the refusal of defendant to acknowledge any liability under the policy, brought this suit, claiming the entire cause of action was vested in him by virtue of assignments to him by the other beneficiaries of their interests. When the policy was issued defendant was known as Knights Templers and Masons Life Indemnity Company but later its name was changed to Western Life Indemnity Company.

The following issues are presented by the pleadings and evidence: 1st. Were assessments 303 and 304 which the assured failed to pay legally levied and did the failure of the assured to pay them afford ground for the forfeiture of his rights under the policy? 2d. Did his failure to pay dues and assessments which accrued or were levied subsequently *ipso facto* work a forfeiture of the policy? 3d. Did the conduct

of the assured disclosed by the evidence constitute an abandonment of the policy?

All of these issues were resolved by the circuit court, where the case was tried without the aid of a jury, in favor of plaintiff, who recovered judgment for \$5331.65, the face of the policy, with accrued interest and the cause is before us on the appeal of defendant. The two assessments in question were levied October 2, 1905, each was made for the avowed purpose of paying a specified death loss of \$5000, Mr. Wayland was duly notified of the assessments and, under date of October 4th, he wrote defendant the following letter:

"Under the existing circumstances, is there no way in which I can pay the present assessment, to keep my policy in force, with the understanding that the money be returned to me if the company goes in the hands of a receiver, in which event I would not consider my policy worth a cent. I have nothing to show I have any claim in the Western Life Indemnity Company. My policy is issued by the K. T. & M. I. Co., and as a claim against the Western would not be of very much value, things look bad to me. Can you give me any assurance that the Western is O. K.?"

To this letter defendant replied October 9th, as follows:

"Receipt is acknowledged of your favor under date October 4. The Western Life Indemnity Company is identically the same company as the Knights Templars and Masons Life Indemnity Company, merely a change of name having been made, as provided by the statute, and for reasons set forth in the notice calling policy holders together last May for the purpose of considering the change.

Your careful attention is invited to the circular letter sent to our policy holders, which refers to this change and many other features which have been recently published in this company's affairs. I beg to assure you that everything contained in the circular

letter referred to is the absolute truth, and unless the efforts of a few misguided members acting under the advice of unscrupulous attorneys are successful in causing the ruin of a solvent organization, you need have no apprehension as to the future.

It is quite impossible to make any arrangements whereby the payments of premiums or assessments due can be held in escrow. This company is solvent, and doing business as usual, meeting every legitimate claim and paying same when due.

In order to maintain your insurance contract with this company it will be necessary for you to make remittances in due time, as provided in the notice sent you."

Not hearing again from Mr. Wayland defendant, on October 16th, sent him the following notice:

"A notice of the last assessment, amounting to fifteen dollars, was mailed to you at the above address on the 2d day of October, 1905. This assessment still remains unpaid. Article 5, section 5 of the by-laws, as now in force, reads as follows:

ARTICLE V.

Sec. 5. Any member who fails to pay or to forward the amount stated in any assessment notice to be due from him within ten (10) days after such notice is mailed to him, is *ipso facto* suspended from membership and from all the benefits arising therefrom; any member thus suspended from membership and benefits shall be reinstated *ipso facto* by the receipt of all amounts due from him at the company's home office in Chicago, while he is alive, within thirty (30) days after such notice was mailed, but the receipt of such a payment at said office from a suspended member after his death shall not affect a reinstatement, though it may have been forwarded prior to his death, and any member from whom such amounts due are not so received at said home office within thirty (30) days after such notice is mailed, *ipso facto*, terminates his

membership and all the benefits arising therefrom. The death of any member during his suspension from membership and benefits, terminates the right to reinstatement by payment of any amount due from him and absolutely defeats the right of any beneficiary or beneficiaries to recover any benefits from this company.

For this nonpayment you are now suspended and are carrying you own risk, but if the above amount is received at this office while you are alive, any time within thirty days after the 2d day of October, 1905, you will be thereby reinstated to membership.

Your attention is called to this as a matter of courtesy only, and we trust that you will attend to it at once. Kindly let us hear from you on receipt of this."

This closed the correspondence. Mr. Wayland did not apply for reinstatement or pay any further dues or assessments and defendant regarded and treated his policy as forfeited as appears from the following evidence of defendant:

"Q. Was any notice given Mr. Wayland that there would be annual dues expected of him on the 24th day of June, 1906? A. I couldn't answer that definitely, but my impression is that there would not be any notice sent to him.

"Q. And why, Mr. Moulton? Why do you say that your impression is that there would not be any notice sent to him? A. For the reason that he had failed to pay assessments 303 and 304, which had been called on that policy.

"Q. Before that time? A. Before that time.

"Q. Then from your best information you would say no further notice was given with respect to annual dues? A. After Mr. Wayland's failure to pay assessments number 303 and 304, it is my belief that there were no notices extended after that date—after that failure to pay those assessments.

“Q. If they were sent it would be contrary to the whole conduct of the company would it not? A. Yes.”

Pertinent provisions of defendant's constitution and by-laws thus were stated by Judge Goode in *Craig v. Insurance Company*, 136 Mo. App. l. c. 8, an action against the same defendant, similar in all essential features to the one in hand:

“The constitution and by-laws are a single instrument composed of different articles consecutively numbered, but not divided or designated separately by the two titles. Such portions of them as are relevant to the appeal will be epitomized. They require the board of directors to hold in trust the property, and assets of the company in accordance with their provisions (article 3, section 1). No member of the order may take out more than \$5000 insurance. On receipt of proofs of the death of a member, an assessment must be levied on the surviving members at a rate increasing with their age, and according to a prescribed table of rates, except in the contingency provided for in the constitution as follows:

“‘No assessment shall be made for less than the above table of rates (i. e., one previously set out in the constitution) nor as long as the money in the death fund will pay the maximum loss in full.’ If a member defaults in the payment of any assessment for sixty days after he is notified, the constitution says he shall be suspended, *ipso facto*, from membership and all benefits accruing therefrom, subject to certain opportunities for reinstatement (article 6, section 2). An annual due of one dollar for each thousand dollars of insurance is required on life policies (article 4, sections 3, 4 and 5). A death fund and a contingent fund are to be created in this manner; seventy-five per cent of all money accruing from assessments is to be placed to the credit of the death fund and used for no pur-

pose except paying death losses and disability claims. All other money accruing to the company must be placed in the contingent fund, out of which the expenses and 'emergencies' shall be paid and the surplus invested in the name of the company in reliable securities (article 8). It is apparent the contingent fund must include twenty-five per cent of the assessments, or the whole amount of them less the seventy-five per cent to be carried into the death fund, and include also the annual dues of one dollar for each thousand dollars of insurance. When a claim arises against the company in consequence of the death of a member, and is allowed by the directors, they are required to pay it in sixty days after receipt of satisfactory proofs of death, and there is this further proviso in the same connection; when the board of directors deems it expedient, the claim may be paid from the contingent fund 'as an emergency, before the collection of the assessment, if any, which may be levied for the payment of said policy; and in such case the proportion of such assessment which would go to the death fund, or as much thereof as is necessary, may be used to reimburse the contingent fund' (article 7). When the surplus or contingent fund exceeds one hundred thousand dollars, a member who has kept up his policy for ten years, shall receive a bond bearing three per cent interest for such portion of the surplus as the total sum paid by the member during the ten years bears to the total sum received by the company during said period (article 7, section 2). The constitution cannot be changed except at a regular meeting of the company and by a vote of three-fourths of the members present and voting."

Plaintiff claims there was more than enough money in the death fund to pay the two death losses aggregating ten thousand dollars and, therefore, that the assessments in controversy were illegal because they were unnecessary, whilst defendant contends that

the death fund not only was deficient, but was overdrawn and indebted to other funds in the sum of \$393,509.10.

It appears that in February, 1905, defendant bought the business of the Pennsylvania Insurance Company, an old line company, for which it paid a broker named Morgan \$200,000. This payment was made—so defendant's books show—out of its contingent fund. From February to September 12, 1905, defendant collected premiums from the policy holders thus acquired (between 6000 and 7000) aggregating \$99,104.20, and placed all such collections in its contingent fund. In the same period it paid death losses on "Pennsylvania" policies in the sum of \$10,978.04, and these disbursements were paid out of defendant's death fund. Defendant claims that these losses though charged to the death fund, were paid out of the contingent fund, for the reason that the death fund was insolvent to the extent of about \$400,000, but though defendant's president testified in its behalf, he gave no explanation or reason for the remarkable and, we might say, incredible state of affairs disclosed by the books.

It will be seen that the case in hand cannot be differentiated from that considered by the St. Louis Court of Appeals in *Craig v. Insurance Co.*, *supra*, and we hold, as did our sister court, and for the same reasons, that the assessments for the non-payment of which defendant declared a forfeiture were illegal and void. As is well said by Goode, J., "no forfeiture of the membership of the deceased could be worked for omitting to pay an illegal assessment. The right to assess is strictly construed and it can only be exercised when the conditions prescribed in the contract of insurance exist." [*Insurance Co. v. Guse*, 49 Mo. 329; *Insurance Co. v. Comfort*, 50 Miss. 662; 2 May on Insurance (4 Ed.), sec. 557; 2 Joyce on Insurance, 1310.]

The most serious question in the case is whether or not the conduct of the assured subsequent to the declaration of forfeiture by defendant amount to an abandonment of his policy.

"The test of an abandonment of rights under a life insurance policy is the existence of an intent to abandon and the presumption is that the owner of property intends to preserve his rights." [Manhattan Ins. Co. v. Wright, 126 Fed. 82; Life Ins. Co. v. Berwald, 76 S. W. 442; Packard v. Ins. Co., 9 Mo. App. 469.]

The fears expressed in the letter of the assured respecting the solvency of defendant and the request they prompted, in no sense were evidence of an intent to abandon any of the rights the assured then had nor did they recognize as legal what, in fact, was illegal. It appears quite clearly that the doubts of the assured were caused by the levy of assessment which subsequent investigation has shown were wrongfully levied and it is fair to presume that had defendant pursued a legal and just course with its policy holders and levied none but proper assessments, the assured would have performed his part of the contract as he had been doing for sixteen years. It must be borne in mind that the declaration of forfeiture was subsequent to the letter. After that declaration the assured remained silent and the real question for our determination is whether or not such silence, coupled with a failure to pay or tender payment of subsequent legal assessments, would indicate an intent in the assured to abandon his property.

Let us consider his position during the three years that elapsed from the date of the declaration of forfeiture to the date of his death. The notice of forfeiture he received apprised him of defendant's purpose to regard his contract as ended and his rights thereunder forfeited. As time went on he knew that other assessments were being levied and the omission

of defendant to give him notice of such assessments was, in effect, notice to him that defendant was continuing in its position that he was no longer a policy holder. He knew that an offer to pay legal assessments would be rejected unless he accompanied such offer with an offer to pay the illegal assessments and complied with the rules provided for the reinstatement of a forfeited policy. Certainly no one could have the temerity to argue that he was compelled to submit to unlawful exactions on pain of being treated as having abandoned his rights, and on what principle may it be said that he was required to tender payment of legal assessments that defendant admits would have been refused, or to bring suit to have his policy reinstated when, in fact, and in law, no forfeiture had occurred? The attempted exaction of an illegal assessment and the declaration of defendant that it would not continue in contractual relation with the assured except on his submission constituted a breach of the contract of insurance that relieved the assured of the obligation to pay or tender payment of subsequent lawful assessments as long as defendant persisted in its wrongful course. The true doctrine thus is expressed in *Shaw v. Insurance Company*, 69 N. Y. 286:

“Where one party to a contract declares to the other party to it, that he will not make the performance on the future day fixed by it therefor, and does not, before the time arrives for an act to be done by the other party, withdraw his declaration, the other party is excused from performance on his part, or offer to perform, and may maintain his action for a breach of the contract when the day has passed. Such is the well-established rule. [*Ford v. Tiley*, 6 B. C. 325; *Franchot v. Leach*, 5 Cow. 506; *Traver v. Halsted*, 23 Wend. 66.] In England the rule is carried much further, and it is held that the positive, absolute refusal by one party to carry out the contract is in itself an immediate complete breach of it on his part,

and dispenses the other party from the useless formality of tendering performance of the condition precedent, and gives immediate right of action. [Cort v. Abergate R. Co., 6 Eng. L. & Eq. 230; Hochster v. De La Tour, 20 Id. 157; Frost v. Knight, L. R., 7 Exch. 111.] And see, also, for the doctrine in this state, Burtis v. Thompson, 42 N. Y. 246; 1 Am. Rep. 516.] But we need not at present go further than the proposition first stated, and sustained by decisions in our own state reports. There is no doubt that the defendant repudiated all obligation to the plaintiff, and so declared to her it would have been a useless act for her after that to have sought the defendant and made offer to pay the annual premium. Nor need she, though the defendant had released future performance, act with effect until the death of her husband, the event which was contemplated by the contract as giving immediate right of action. It was then she sustained the injury which was the cause of damage to her, by the nonperformance by the defendant of their contract."

Among the authorities to the same effect are the following: Heyer v. Ins. Co., 73 N. Y. 516; Guetznow v. Ins. Co., 105 Wis. 448; Pulling v. Ins. Co., 52 Ill. App. 452, 159 Ill. 603; Griesemer v. Insurance Co., 10 Wash. 202, 38 Pac. 1031; Sullivan v. Ben. Assn., 26 N. Y. S. 186; Pilcher v. Ins. Co., 33 La Ann. 222; Ins. Co. v. Smith, 42 O. St. 156; Grand Lodge v. Scott, 93 N. W. 190; 2 Joyce on Insurance, 1123; Ins. Co. v. Benefit Society, 181 Pa. 443; Agnew v. A. O. U. W., 17 Mo. App. 254; Ins. Co. v. Germany, 74 Ga. 57; 3 Cooley's Brief on Insurance, 2330; 3 Bacon on Benefit Societies & Life Ins., sec. 376; Reed v. Ins. Co., 82 N. E. 736; Hicks on Ins. Co., 96 S. W. 962; Ins. Co. v. Ins. Co., 86 Pa. St. 236; Benjamin v. Assn., 79 Pac. 517; Heinlein v. Ins. Co., 59 N. W. 615; Strauss v. Assn., 36 S. E. 352; Life Assn. v. Kentner, 58 N. E. 966; Hayner v. Ins. Co., 69 N. Y. 435.

It must be remembered that a life insurance policy is not a contract of indemnity but a contract to pay money upon the death of the assured in consideration of certain payments being made during his life (*Reed v. Ins. Co.*, *supra*), and, therefore, it is a contract for life and not merely one for the period covered by the last periodical premium with the privilege of renewal. [*Life Ins. Co. v. Statham*, 93 U. S. 246.] The contract continues in force during the life of the assured and can be terminated before the event of his death and against his will only by a breach by him of some obligation or duty imposed on him by the terms of the contract. The insurer cannot make its own wrongful repudiation of the contract a ground of forfeiture nor can the mere passive, silent resistance of the insured to the unlawful aggression, be tortured into an abandonment of the policy. [*Guetznaw v. Insurance Co.*, *supra*; *Purdy v. Assn.*, 101 Mo. App. 109; *Smith v. Roach*, 59 Mo. App. 115; and cases cited; *Spurlock v. Sproule*, 72 Mo. l. c. 509; *Bostwick v. Fire Department*, 49 Mich. 513; 3 Cooley's Brief on Insurance, p. 2398.]

There is a line of decisions that on casual reading might be considered unfriendly to the rules we have stated and have shown to be so abundantly supported by authority, but a more careful consideration and analysis of these decisions discloses that they are not out of harmony with the great current of authority to which we have referred. They relate to cases where the assured evidently did abandon the policy and after his death his beneficiary attempted to rely, not on a wilful, illegal exaction of the assurer attempted to be forced on the assured in defiance of his lawful rights, but on some mere negligence or technical error with respect to the giving of some notice in conformity with the terms of the contract.

The courts very wisely refuse to recognize as sound a position resting on such an arbitrary and unfair foundation. The holder of an insurance policy,

knowing that premiums and assessments will become due periodically, has no right to sit down in silence, fail to pay subsequent premiums and nurse the point that by some slight oversight or mere technical error the assurer has given him the right to hold his insurance without paying for it. Such are the cases of *Insurance Co. v. Hill*, 193 U. S. 551; *Insurance Co. v. Phinney*, 178 U. S. 328; *Insurance Co. v. Sears*, 178 U. S. 345; *Smith v. Ins. Co.*, 63 Fed. 769; *McDonald v. Grand Lodge*,—Ky. Law, 883, 53 S. W. 282; *Lane v. Ins. Co.*, 33 Wash. 577.

The distinction between those cases and the one in hand is obvious. In the one class the insurer was guiltless of conscious wrongdoing and merely negligent or mistakenly inaccurate in the performance of some technical duty and the beneficiary of the lapsed policy was attempting to take what the court in the *Hill* case (*supra*) designated as "snap judgment." In the case under consideration the assurer by levying assessments that had no contractual or legal foundation, deliberately violated the contract and then arbitrarily declared it forfeited because the assured would not submit to the imposition. On what principle should he be required to protest and to keep on protesting against an injury of that character, or to tender lawful assessments subsequently levied which the excessive and high handed conduct of the assurer proclaimed would not be accepted? Or why should he be required to engage in expensive litigation to reinstate his policy—a contract for life—which had not been legally forfeited and which he had performed until the breach by defendant made further performance impossible?

We fail to find a single case in support of a doctrine so unfair and so violative of fundamental principles of contract law that would hold the assured remiss for standing on his contract in reliance on his right to require the assurer to treat him fairly and to perform its part of the contract. Our attention

has been called to the case of *Ryan v. Life Assn.*, 96 Fed. 795. In that case the assured, disgusted at the conduct of the assurer wrote a letter in which he expressly stated that he "had quit"—had abandoned the policy. Of course a party to a contract which has been breached by the other party may elect to terminate the contract. That is a familiar rule of contract law, but it has no application here for the reason that Wayland did not make such election but merely remained silent after he received notice of the forfeiture.

And there is another class of cases to which we are referred that are not in point. They relate to the suspension or expulsion of members of fraternal beneficiary societies, stock exchanges, guilds, etc. [*Glar-don v. Supreme Lodge*, 50 Mo. App. 45; *Miller v. Grand Lodge*, 72 Mo. App. 499; *Lavin v. Grand Lodge*, 112 Mo. App. 1; *Range v. Supreme Council*, 128 Mo. App. 461; *Kouter v. St. Louis Stock Exchange*, 189 Mo. 26.]

A terse statement of the rule of such cases is that a member of a lodge, fraternal society, or guild, should exhaust the remedies offered him by the rules and practices of the society for the correction of an injury caused by a wrongful suspension or expulsion before he resorts to the courts and, failing to avail himself of such opportunity, will be held to have acquiesced in his suspension or expulsion. Conceding, *arguendo*, the soundness of this rule, it does not apply to old line or assessment insurance where, as here, the so-called member is a member only in name and has no opportunity of appealing to the legislative body of a democratic organization for a redress of his wrongs. In *Lavin v. Grand Lodge*, *supra*, Goode, J., observed the difference in this respect between fraternal and old line or assessment insurance. Speaking of decisions relating to the latter classes of policies, he says:

"It is obvious such decisions have a very remote bearing on the question at issue in the present controversy. They were given in cases not against benevolent societies but where a company organized for profit was endeavoring to avail itself of a *default which it had caused*. The purpose of the present defendant is not profit but to provide for the families of deceased members; and there is nothing even tending to prove it would have refused to reinstate Lavin, or correct the blunder made against him, if he had sought redress. No motive for such a refusal appears."

But in a fraternal society where the injury is not the result of a mere blunder as in the Lavin case, but is clearly shown to be an intentional and wrongful aggression against the rights of the member, committed or ratified by the supreme power in the society, there is no reason in law or morals for compelling the injured member to go through the vain and useless form of obtaining redress in the society.

But it is suggested that it would be unjust to allow an assured whose policy had been wrongfully forfeited to sit idly by for, perhaps fifty years, without paying or offering to pay lawful premiums or assessments. But if the forfeiture has been caused by the intentional wrong of the assurer, or by its breach of the contract, of which it must have known, and it persists in its unlawful attitude, wherein lies the injustice of holding it to its contract?

It is a misconception of the rules we are applying to say they give the assured free insurance and, therefore, give him an advantage over paying members. In the first place, members who submit to unlawful exactions are not entitled to any special consideration on account of such complaisance, and in the next place, the law charges lawful premiums on assessments against the assured and his beneficiary must have them deducted from the benefit and may re-

cover only the difference. [Reed v. Ins. Co., *supra*, and cases cited.]

This sufficiently answers the free insurance agent argument. Our conclusion is that Wayland did not abandon his policy by his mere failure to protect against the forfeiture and his subsequent omission to tender payment of valid assessments.

We find no error in the rulings of the trial court on declarations of law asked by defendant and a careful inspection of the record convinces us that the issues were fairly tried.

The judgment is for the right party and is affirmed.

Broaddus, P. J., concurs; *Ellison, J.*, dissents in separate opinion.

DISSENTING OPINION.

In my opinion the trial court erred in its declarations of law which, practically cut out defendant's defense. And so, in effect, it was declared by the court that there was no evidence tending to show an abandonment. My views on that subject are expressed in a dissent filed in *Johnson v. Hartford Life Ins. Co.*, this day decided. As in that case, I deem the decision of the majority in conflict with *Konta v. St. Louis Stock Exchange*, 189 Mo. 26; and the following decisions of the St. Louis Court of Appeals. [*Glaridon v. Supreme Lodge K. of P.*, 50 Mo. App. 45; *Miller v. Grand Lodge*, 72 Mo. App. 499; *Lavin v. Grand Lodge A. O. U. W.*, 112 Mo. App. 1; *Bange v. Supreme Council Legion of Honor*, 128 Mo. App. 461.] The case should therefore be transferred to the Supreme Court for final determination.

HERMAN H. LIBBE, Appellant, v. ESTELLE M. LIBBE, Respondent.**Kansas City Court of Appeals, June 17, 1912.**

1. **DIVORCE: Motion for Alimony: Appeals and Error.** A motion for alimony *pendente lite* in a divorce proceeding relates to a cause of action that is separate and distinct from the divorce cause, but is incidental thereto, and an order, made on a proper hearing of such motion, is an adjudication of the issues thereby raised, and on the failure of the defeated party to perfect an appeal from such order the adjudication becomes final.
2. ———: **Alimony: Right of Wife.** Whether guilty or innocent the wife has a right to prosecute or defend an action for divorce, and since the husband usually holds the purse strings he must furnish her the means of attack or defense, if she is without adequate means of her own, and the fact that she is found to be the guilty party does not deprive her of the right to an appeal and to the means of prosecuting it and to sustain herself during its pendency.
3. ———: **Judgment: Collateral Attack.** Where a motion for alimony, pending an appeal, is overruled and no appeal taken from such judgment, it is error to thereafter sustain a motion to set aside such judgment.

Appeal from Buchanan Circuit Court.—Hon. William D. Rusk, Judge.

AFFIRMED IN PART AND REVERSED IN PART.

Allen, Gabbert, Mitchell & Martin for appellant.

C. C. Crow for respondent.

JOHNSON, J.—The cause is before us at this time on appeals of plaintiff from judgments rendered in favor of defendant on certain motions filed by defendant relating to alimony, *pendente lite*, and suit money. In 1908 plaintiff commenced the action by filing his petition for a divorce. In due time defendant an-

swered and also filed a crossbill in which she prayed for a divorce, for the custody of the offspring of the marriage for alimony. Before the trial defendant filed a motion for alimony *pendente lite*, and suit money and the court sustained the motion and made defendant an allowance for her maintenance and for attorney's fees that evidently was intended to provide for her necessities until the trial of the case on its merits. The court, at the trial, found the issues for plaintiff, granted him a divorce and dismissed defendant's crossbill. Defendant appealed to this court and we held that neither party was entitled to a divorce. [Libbe v. Libbe, 157 Mo. App. 701.] After the trial and before perfecting her appeal defendant filed a motion for alimony and suit money pending the appeal. The court overruled the motion and defendant failed to appeal from the judgment overruling it. After perfecting her appeal defendant filed a motion in this court for alimony and suit money pending the appeal. This motion was taken with the case and was overruled in our decision on the ground that original jurisdiction over issues of alimony is vested alone in the circuit court having jurisdiction of the divorce suit and that since defendant had not appealed from the judgment of the circuit court disallowing alimony *pendente lite*, and suit money there was nothing before us for review but the judgment awarding a divorce to plaintiff and giving him the custody of the child. We concluded by reversing the judgment and remanding the case "for further proceedings in accordance with the views expressed."

After the cause was remanded to the circuit court defendant on June 15, 1911, filed a motion attacking the judgment overruling her motion for alimony and suit money which, as stated, was filed in the circuit court after the trial of the case on the merits and which was overruled July 20, 1909. The ground of the

attack was that the court overruled the motion without hearing evidence. Plaintiff filed an answer to this motion in which the jurisdiction of the court to entertain it was challenged. The court tried the issues raised by this motion and answer on June 20, 1911. Evidence was introduced from which it appears that when the motion filed by defendant for alimony pending the appeal of the divorce suit came on regularly for hearing, both parties were represented in court by counsel. Referring to the motion, the court said "Are you ready to take it up?" Counsel for plaintiff answered "Yes, sir." Counsel for defendant, "then read the motion for suit money." The court inquired of counsel for defendant, "Do you wish to be heard on it?" Counsel said, "No." Counsel for plaintiff then made an argument and the court took the motion under advisement. Afterward the court overruled the motion and the following record was made of the order:

Thursday, July 20, 1909, and during the May term of the circuit court, 1909. Now at this day come the parties to the above entitled cause by their respective attorneys and the motion for suit money coming on regularly for hearing is at this time taken up, argument of counsel heard thereon and this court being fully advised in the premises doth now overrule said motion."

Counsel for defendant did not offer any evidence on the motion. Evidence had been heard by the court on the first motion for alimony and suit money and at the trial of the divorce suit the issues relating to alimony had been thoroughly contested by the parties and the court had before it evidence *pro* and *con* bearing on the subjects of plaintiff's pecuniary condition and defendant's lack of means. Counsel for defendant testified that he refused to introduce evidence or to submit the motion for adjudication for the reason that he deemed the court was prejudiced against his client, but the stenographer's notes from which

we have quoted show, as stated, that he read the motion to the court and declined to make an argument upon it. The court sustained the present motion to set aside the judgment entered July 20, 1909, overruling defendant's motion for alimony and suit money on the ground that since there had been no legal hearing on that motion the court was without jurisdiction to enter a judgment overruling it. Plaintiff immediately filed a motion for a new trial which was overruled, whereupon plaintiff filed affidavit for appeal and the appeal was allowed. All of these proceedings occurred on June 20, 1911. On July 5, 1911, and at the same term, the order of appeal was set aside and on July 8th the appeal again was allowed. We shall dispose of the judgment on this motion before referring to the other motions we are called on to review.

The statute provides (section 2375, Revised Statutes 1909): "The court, on application of either party, may make such alteration, from time to time, as to the allowance of alimony and maintenance, as may be proper and the court may decree alimony pending the suit for divorce in all cases where the same would be just, whether the wife be plaintiff or defendant," etc.

Under this statute the original jurisdiction of the subject of alimony is lodged in the circuit court (Libbe v. Libbe, 157 Mo. App. 1. c. 709) and a motion for alimony *pendente lite*, filed in that court in a divorce proceeding relates to a cause of action that is separate and distinct from the divorce cause but is incidental thereto. "The power of the court," say the Supreme Court in *State ex rel. v. Seddon*, 93 Mo. 520, "to order and enforce allowance for alimony *pendente lite*, although an adjunct of the action for divorce, is an independent proceeding standing upon its own merits, and in no way dependent upon the merits of the issues in the divorce suit, or in any way affected by the final decree upon those merits. It grows, *ex necessitate rei*.

out of the relations between the parties to the controversy, and has nothing to do with the merits of that controversy. The order making such allowance in this case was a final and definite order disposing of the merits of that proceeding in the circuit court and the relator was entitled to make his appeal." Such being the nature of the subject of alimony *pendente lite*, an order of allowance or disallowance of such alimony made on a proper hearing of the motion therefor is an adjudication of the issues raised by the motion and on the failure of the defeated party to perfect an appeal from the judgment sustaining or overruling the motion the adjudication becomes final. Defendant in failing to appeal from the judgment overruling her motion for alimony and suit money pending the appeal cannot be heard to challenge that adjudication in a collateral attack.

But counsel for defendant insist that there was no proper and lawful hearing of the motion since the record of the judgment fails to show the court heard evidence introduced thereon and that this was such an irregularity as would warrant the court in setting aside the judgment in a proceeding for that purpose instituted at a subsequent term. We concede that "if the plaintiff does not come into court to prosecute his suit no judgment can be taken against him and his action should be dismissed" (Wright v. Salisbury, 46 Mo. 26; Clowser v. Noland, 72 Mo. App. 1. c. 220), and that "when there is no evidence introduced the proper practice is to dismiss the proceedings." [Kelerher v. Henderson, 203 Mo. 1. c. 516.] But these rules do not aid the position of defendant for the obvious reasons that defendant was present at the hearing by her counsel who presented the motion to the court by reading it and the court had before it evidence on the issues thus raised. Though the motion related to an independent proceeding, it was a proceeding that was engrafted on the action for divorce and the court was

bound to take judicial notice of the evidence heard at the trial of the suit on its merits which pertained to the issues of alimony and suit money. This evidence was fresh in the mind of the court, fully covered the issues raised by the motion, and it would be absurd to say that the court, in order to act intelligently on the motion was bound to hear anew evidence already lodged in his breast. The refusal of counsel for defendant to offer evidence, in effect, was a declaration that defendant had no additional proof to that already adduced. We conclude the record discloses that there was a proper hearing of the motion, that the judgment rendered thereon was not irregular and that it should not have been set aside on the ground of fatal irregularity.

Immediately after the court sustained the motion setting aside the judgment we have been discussing defendant filed another motion (on June 20, 1911) for alimony *pendente lite*, and suit money. Plaintiff filed an answer and defendant a reply. The issues raised by these pleadings were tried on July 27th and the court rendered the following judgment:

“Now on this 27th day of July, 1911, comes the parties to this cause in person, and by their respective attorneys, and a motion for temporary alimony, suit money and attorneys’ fees, filed herein June 24, 1911, entitled Exhibit “B,” is now here taken up, presented to the court, the evidence is here and the argument of counsel, and the court being fully advised in the premises, sustains said motion and now here adjudges and decrees that defendant be allowed the sum of \$1075 for her attorney fees to date, and the further sum of \$175, as expense money laid out for her by her attorneys, all the sum to be paid to Mr. Charles C. Crow, her attorney of record; also, the further sum of \$1500 as alimony, which is now fixed at the sum of sixty dollars a month, and to be paid the first day of each month until the further order of this court, said mo-

tion of \$1500 being for the twenty-five months since the alimony money herein awarded said defendant ceased to be paid."

In due time plaintiff filed motions for a new trial and in arrest of judgment which were overruled and plaintiff appealed.

As we have already stated the court had sustained a motion for alimony *pendente lite*, the suit money presented by defendant shortly after the institution of the suit and plaintiff had performed that decree by making the required payments to the time of the trial of the divorce suit. The purpose of the motion filed by defendant at the conclusion of the trial on the merits was to procure an order continuing the allowance to defendant of maintenance money during the pendency of the divorce action on appeal and also to procure an allowance of suit money that would enable her to pay her counsel reasonable fee for representing her in the appellate court, the allowance for attorney's fees and expenses made under the original motion being insufficient to cover such fees and expenses. After the court overruled that motion defendant received no money from her husband and being wholly without means of her own was compelled to depend on her father for her sustenance and for means to carry on the suit. The allowance in question being for alimony during the period following that of the original order and for suit money for the same period covers the same ground as that included within the scope of the overruled motion and it is the contention of plaintiff that the judgment rendered on that motion is *res adjudicata* of all issues which were raised or should have been raised by it.

We can conceive of no just ground on which the order of the court overruling that motion could have been based. Plaintiff is a prosperous business man in good circumstances and enjoying a good income from his business. Defendant, his wife, had no means

of her own, and unless she procured the money from her husband for her support and to carry on the divorce suit necessarily either would have had to abandon the suit or else resort to her family or friends for means. The law does not contemplate that a wife shall be reduced to a condition so hard. The Ecclesiastical courts of England allowed suit money almost as a matter of course and regulated the allowance to meet exigencies as they arose. Our statutes relating to alimony *pendente lite*, and suit money are but a modern adaptation of the rules and practices of the Ecclesiastical law. Whether guilty or innocent, the wife has a right to prosecute or defend an action for divorce and since the husband usually holds the purse strings he must furnish her the means of attack or defense if she is without adequate means of her own. The fact that the trial court found that the wife was the guilty party did not deprive her of her right to an appeal and of her right to the means of prosecuting it and of sustaining herself during its pendency. [Robbins v. Robbins, 138 Mo. App. 211; Rosenfeld v. Rosenfeld, 63 Mo. App. 411; Adams v. Adams, 49 Mo. App. 592.] The overruling of defendant's motion for alimony and suit money pending the appeal was not an exercise of sound discretion and under all the circumstances of the case was a grievous wrong to defendant.

It is true the judgment overruling the motion was an adjudication of the issues it raised and the failure of defendant to appeal left that adjudication impervious to a subsequent collateral attack but it did not divest the circuit court of jurisdiction over the subject-matter of alimony *pendente lite*. Before the rendition of final judgment in the divorce action and while the action is pending in the circuit court that court is given the power by the statutes to deal with the subject of alimony (Robbins v. Robbins, *supra*) and regardless of former motions and of judgments upon them, within the limits of a sound discretion, the court

may make such changes and alterations in respect of such judgments and of the allowance of alimony as the circumstances of the case seem to demand. At the time of the rendition of the judgment on the motion under consideration the divorce suit was pending in the circuit court. Our mandate remanded it to that court "for further proceedings in accordance with the views expressed" which meant that the final decree dismissing the petition and cross petition for divorce were to be entered at a future time. Until the entry of that decree the action was pending, the circuit court had jurisdiction of the subject of alimony and possessed the power to deal with that subject in its entirety.

Taking into consideration the pecuniary ability of plaintiff and the status of the parties, we do not find that the allowance of alimony was excessive and considering the nature and history of the divorce suit, we think the allowance for attorney's fees was within proper bounds. Defendant filed two other motions, one for suit money to defray her expenses and fees in the matter of plaintiff's appeal from the judgment sustaining the motion for alimony and suit money and the other for suit money to defend the judgment on the motion to set aside the judgment on the former motion for alimony and suit money. The court sustained these motions and made a reasonable allowance in each instance. This was proper.

The judgment setting aside the judgment (rendered July 20, 1909) overruling the former motion for suit money is reversed. The judgments rendered on the three motions relating to alimony and suit money are affirmed. All concur.

FRANCES CLARA HAAKE, a Minor, by Next Friend CHARLES G. HAAKE, Respondent, v. WILLIAM H. DAVIS, Appellant.

Kansas City Court of Appeals, June 17, 1912.

1. **NEGLIGENCE: Automobiles.** Plaintiff, a girl six years old, while in a public street with a large crowd of adults and children at the scene of a collision between a street car and an automobile, was struck down and run over by an automobile which was driven at a dangerous rate of speed through the crowd which opened a way for said automobile. The rear wheel ran over and broke her leg near the hip. *Held*, that the evidence, as a whole, was sufficient to warrant the submission of the case to the jury.
2. **PLEADING: Specific Negligence: Evidence.** Where specific acts of negligence are pleaded, recovery must be upon proof of one or more of such pleaded acts, and the burden is on the pleader to show not only negligence as alleged but that such negligence was the direct and proximate cause of the injury.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield*, Judge.

AFFIRMED.

Battle McCardle for appellant.

Reinhardt & Schibsby for respondent.

JOHNSON, J.—Plaintiff, a girl six years old, was struck and run over by an automobile owned and operated by defendant and, by her next friend, instituted this suit to recover damages for the injuries she sustained. The answer in legal substance is a general denial. The cause is here on the appeal of defendant from a judgment of seven hundred and fifty dollars recovered by plaintiff in the circuit court.

The injury occurred about six o'clock in the afternoon of April 26, 1910, on Grauman avenue in Kan-

sas City at a place just east of Holmes street. Shortly before the injury a street car running on Holmes street collided with and disabled an automobile and the wrecked vehicle had been removed from the track and placed in Grauman avenue, a short distance east of Holmes street. The place is in a thickly populated residence district and in a short time a large crowd, variously estimated at from forty to one hundred persons had collected around the automobile. The crowd was made up of adults and children of various ages, the children predominating. There was much noise and confusion and some of the children were playing. The street was filled with the crowd when defendant, driving a two-seated gasoline runabout approached from the west on Grauman avenue.

Witnesses for plaintiff testified that the car came into the intersection of Holmes street at a speed of twelve or fifteen miles per hour; that it slowed down at the crossing of the street car tracks, and continued on eastward through the crowd at a speed much faster than a fast walk. The crowd opened a way for the automobile and there is evidence tending to show that plaintiff was standing at the edge of the crowd in a place to which she had moved a moment before. Some part of the south side of the automobile struck her, probably the mud guard or fender over the front wheel, and threw her down. The rear wheel on that side of the car ran over her and broke one of her legs near the hip. It is alleged in the petition that the car "was recklessly, carelessly and negligently driven against, upon and over this plaintiff," and the specific acts of negligence charged are, first, in running the car at a high and dangerous speed and, second, in failing to exercise reasonable care to avoid the injury after defendant discovered or should have discovered the dangerous position of plaintiff.

Defendant testified that when he turned into Grauman avenue he was running on the high gear but as he

approached the street car tracks he reduced speed almost to a full stop, changed to the low gear, blew the horn several times, saw the crowd, which he thought consisted of seventy-five or one hundred persons, open a way for his passage and, on a signal from several people in the crowd, proceeded forward at a speed of not over one mile per hour, the slowest speed the car could go and retain its power. He states that he had his foot on the brake and was attentively watching his course to see that no one got in the way of the car; that suddenly, as he had passed about half through the crowd, plaintiff came rapidly from the south and ran into the car either at the fender over the front wheel or at the step. We quote from his testimony: "I changed my gear and practically stopped on the west side of Holmes street, on the car tracks, and blew my horn several times until the crowd spread apart, and several people beckoned for me to come on; and, then I went just as slow as possible on a low gear through the crowd; and after I had gotten probably half way through, I noticed a little girl seemed to pitch a little to the head of the center of my car, and I immediately turned it up, and stopped within six feet. I felt that the wheel of the car had gone over this child, and I stopped within six feet—but, I had passed through the crowd—entirely through. . . . I never saw the child until I saw this little thing dart out of this crowd, after I was about half way through the crowd—saw her pitch through the crowd; and, I immediately turned on the lawn, and threw my power off. . . . Q. You stated, I believe, that you tooted your horn, and some people motioned to you to come on? A. Yes, sir. Q. And that the crowd then parted? A. Yes, sir.

"Q. To what extent did they part? A. There was no one in the street north of the car. They all spread to the south toward the injured car that was on the south side of the street. There was some peo-

ple on the sidewalk at the north; but not in the street.

....

"Q. Then how fast do you say you were going when you were crossing Holmes street and went seventy or seventy-five feet east of Holmes street, at the time this child was struck? A. Just crawling along as slowly as possible, with my feet on the brakes.

"Q. What part of your machine first struck the child? A. I judge it was the fender. . . .

"Q. What part of this fender on the right side of your machine struck the child first, the front part or the center part? A. The child struck the step, just about the center of the machine.

"Q. You mean to say that the child ran from the south and ran against your machine? A. Ran against the machine; seemed to dive right against it.

"Q. Instead of the machine striking the child? A. That is the best of my recollection; yes, sir."

At the request of plaintiff the court gave the following instruction: "It is the duty of the defendant, in running his automobile through the streets of a populous city, to use ordinary care to so regulate the speed of his automobile as not to injure any one, and failure to use such care is negligence, and the court instructs the jury that if you find and believe from the evidence that, on April 26, 1910, at about 6 p. m., the plaintiff, while in the exercise of ordinary care herself (if you find she did use such care), as defined in another instruction, was standing or playing on Grauman avenue, and if you further find that the defendant, while running his automobile, mentioned in the evidence, failed in the above defined duty, and negligently ran his automobile into, upon or over plaintiff (if he did so), and if you further find that, by reason of the above, the plaintiff was injured, then your verdict must be for the plaintiff."

It is insisted by defendant that its request for an instruction peremptorily directing a verdict in its fa-

vor should have been given. Counsel argue that there is no proof of the allegation that the automobile "was driven against, upon and over this plaintiff" while she was standing in the street and that plaintiff cannot be allowed to recover on any other act of negligence than that alleged in her petition. The rule that a plaintiff in a negligence case who pleads a specific act or acts of negligence must recover, if at all, on proof of the existence of one or more of such pleaded acts is a familiar one as is also the rule that the burden is on the plaintiff not only to show by evidence that the defendant was negligent as alleged but that such negligence was the direct and proximate cause of the injury. The causal connection between the negligence and the injury must not be left in the realm of doubt or conjecture. [Warner v. Railroad, 178 Mo. 125; Goransson v. Mfg. Co., 186 Mo. 300; Trigg v. Land Co., 187 Mo. 227; Byerly v. Light Co., 130 Mo. App. 593.]

But the burden of plaintiff does not compel her to prove the negligence or its causal relation to the injury by direct and positive evidence. The existence of such ultimate facts may be established by circumstantial evidence. No witness introduced by plaintiff saw the car strike her, but she was seen standing close to the south line of the way opened in the crowd for the car, was seen to fall, and the fact that the rear wheel ran over her, in effect, is conceded. Defendant says there was a collision between plaintiff and the mud guard or step but that the collision was caused by plaintiff darting out from the crowd and running against the car. He is contradicted by the witnesses of plaintiff not on the fact that there was a collision but on the fact that it was caused by plaintiff running against the fender and not by the fender striking her. The evidence, as a whole, supports an inference that defendant brushed the side of the car against plaintiff while she was standing still and knocked her down;

and further, the inference is very strong that the car was being run through the crowd at a high and dangerous speed.

To run an automobile at ten or twelve miles per hour on an open, unobstructed street might not be negligence, but to run one at half that speed through a large crowd of playful, noisy children, would be an act of gross negligence, since it would be almost certain to result in injury to some of the children. The evidence of plaintiff is to the effect that the car was run through the human lane opened for its passage at a speed faster than a fast walk—at five or six miles per hour—and we think defendant's counsel is wrong in the view that this evidence is opposed to the plain and undisputed physical facts of the situation. The fact that defendant, who says he was in a position to make immediate use of the appliances for stopping, could not stop in less than six feet, strongly negatives his assertion that the car was barely creeping and was not going to exceed one mile per hour. The jury were entitled to the belief that an automobile going at that speed and under such perfect control could be stopped at once, in less than a foot, and that since it ran as much as six feet after defendant put forth his utmost effort to stop, it must have been going at about the speed stated by plaintiff's witnesses. It is hard for us to believe that a child struck by the outer edge of the mud guard of a car running only a mile an hour would be thrown down and run over by the rear wheel with the autoist doing his best to stop. To our minds the version of the injury given by the witnesses for plaintiff is more consistent with the undisputed physical facts than that given by defendant. It was the duty of defendant in running his car to exercise care commensurate with the exigencies of the situation. [Hall v. Compton, 130 Mo. App. 1. c. 681; Ladd v. Williams, 104 Mo. App. 390; McFern v. Gardner, 121 Mo. App.

1; Engleman v. Railway, 133 Mo. App. 514.] An ordinarily careful and prudent person in his position would have realized the danger of running through a large, noisy, mixed crowd in any but the most cautious manner. In such cases the greatest care is only ordinary care. We hold that plaintiff's evidence presented issues of fact for the jury to determine and that the court did not err in overruling the demurrer to the evidence.

We must rule against the contention of defendant that the instruction we have copied contains prejudicial error. The definition in the opening clause of the degree of care defendant was bound to exercise correctly expresses the true rule. It does not contain the suggestion that defendant was an insurer of the safety of plaintiff and as applied in the succeeding portions of the instruction the rule thus stated did not enlarge the scope of the pleaded negligence. There is no prejudicial error in the record and accordingly the judgment is affirmed.

WALTER B. BROWN, Respondent, v. KANSAS CITY, CLINTON & SPRINGFIELD RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 17, 1912.

1. **NEGLIGENCE: Injured at Crossing: Failure to Whistle for Crossing.** Plaintiff sued for damages for injuries received by a collision of his wagon with a locomotive while driving a team of horses hitched to said wagon, on a public wagon road over a crossing of defendant. He stopped, looked and listened before going over the crossing, but neither he nor his companions who were riding in the wagon with him could see or hear any train approaching, and no whistle was sounded. The train was running light, down grade with so little noise that an attentive person in plaintiff's situation could not hear it and because of obstructions to vision could not see it. *Held*, that the demurrer to the evidence was properly overruled.

2. —: Statute: Crossing Signals. Section 3140, Revised Statutes 1909, imposes the duty on railroads to signal for crossing and a failure to give such signals is *per se* negligence.

Appeal from Cass Circuit Court.—*Hon. W. A. Whitsett*, Judge.

AFFIRMED.

John H. Lucas and *Charles W. Sloan* for appellant.

It was the duty of the respondent before driving upon the tracks of appellant to stop, look and listen, and inform himself as to the proximity of the train before attempting to cross. Elliott, 2nd Ed., 3rd Vol., p. 1143, pages 310 and 311; *Boyd v. Wabash*, 105 Mo. l. c., 376, 377; *Zimmerman v. Co.*, 71 Mo. 476; *Stotler v. Railroad*, 204 Mo. 638; *Kelsay v. Railroad*, 129 Mo. 372; *Schaub v. Railroad*, 133 Mo. App. 450; *Sanguinette v. Railroad*, 196 Mo. 466; *McManamee v. Railroad*, 135 Mo. 440. There is no evidence that appellant's agents were negligent in any manner. See authorities Subdivision No. 1; *Newton v. Railroad*, 152 Mo. App. 167; *Waggoner v. Railroad*, 152 Mo. App. 173.

W. D. Summers and *Ball & Ryland* for respondent.

A failure to give the statutory signal is held to be negligence *per se*. *Gratiot v. Railroad*, 116 Mo. 450. The right of an injured traveler to recover for an injury at a crossing depends upon the facts connected with such injury, and where the evidence is conflicting, it is a question for the jury. *Herring v. Railroad*, 80 Mo. App. 562; *Petty v. Railroad*, 88 Mo. 306; *Murry v. Railroad*, 101 Mo. 236; *Gratiot v. Railroad*, 116 Mo. 450; *King v. Railroad*, 143 Mo. App. 279. If company has made crossing dangerous by placing of cars in such position as to obstruct the view of the track, it

is bound to use precautions commensurate with the increased danger and to give signals. White on Personal Injuries on Railroads, Vol. 2, section 957. Under the law of Missouri, the railroad company must establish that the signals were given, where an injury occurs at a crossing of a highway, and proof that no signals were given raises the presumption, against the company, that this was the proximate cause of the injury to the traveler. Crumpley v. Railroad, 111 Mo. 152; Coffin v. Railroad, 22 Mo. App. 601. Where witnesses near at hand and in position to see and hear, testify that no signals were given, they may be believed, as against others, who state that the signals were given. Railroad v. Cauffman, 38 Ill. 424. The fact that plaintiff urged his team across the track, or the fact that his team became frightened and rushed across the track, is not negligence on the part of the plaintiff. Lang v. Railroad, 115 Mo. App. 489.

JOHNSON, J.—Plaintiff was injured at a public road crossing in a collision between his wagon and a train on defendant's railroad, and sued to recover the resultant damages sustained by him on the ground that his injury was caused by negligence of defendant in the operation of the train. The answer is a general denial. At the close of the evidence a request of defendant for a peremptory instruction was refused and issues of fact were submitted to the jury in appropriate instructions. A verdict for plaintiff was returned and after its motion for a new trial was overruled defendant appealed. The only claim of error advanced by counsel for defendant in his brief and argument is that plaintiff failed to make out a case to go to the jury and that the court should have sustained the demurrer to the evidence.

The injury occurred late in the afternoon of April 17, 1911, just inside the corporate limits of the city of

Harrisonville, at a crossing of a public wagon road and defendant's railroad. Plaintiff, a farmer, was driving a large, spirited team hitched to a new farm wagon. A companion was seated with him and a farm hand stood immediately behind them supporting himself by holding to the back of the seat. The tracks of three railroad companies run parallel to each other through Harrisonville from northeast to southwest. The wagon road under consideration approaches these tracks from the southeast and continues in a northwest course until it crosses the middle tracks where it turns on a wide curve to the west and crosses the last tracks—those operated by defendant—at an acute angle. Plaintiff approached the crossing from the southeast. First he crossed the tracks of the Missouri Pacific Railway Company, passing the depot which was on the right hand side of the public road. Then he passed over the space between that crossing and the crossing of two tracks (the main line and a switch) of the Missouri, Kansas & Texas Railroad. The switch track was fifty feet beyond the main line. Approximately 150 feet further on was the crossing of a switch track of defendant and twenty feet beyond that was the crossing of the defendant's main line where the collision occurred. Buildings and other obstructions, including freight cars standing on defendant's switch track, obstructed the view to the northeast from a point some distance southeast of the Missouri Pacific crossing and the evidence of plaintiff shows that it was impossible for the occupants of the wagon to see a train approaching from the northeast on defendant's main line until after they emerged from behind the box cars on the switch. At that time the heads of the horses were not over four feet from the main track and a passenger train coming from the northeast at thirty miles per hour was not over one hundred and fifty feet from the crossing. Danger blasts from the locomotive whistle caused the team to

become unmanageable and to plunge and bolt over the crossing. The locomotive struck the rear end of the wagon and plaintiff was injured in the collision.

The evidence of plaintiff tends to show that no signal was given for the crossing either by whistle or bell. When the wagon was crossing the switch track of the Missouri, Kansas & Texas road and was, perhaps 150 feet from the place of collision, plaintiff and his companions heard a crossing signal for another crossing a quarter of a mile to the northeast and they agreed the signal was from a train on one of the other roads. But to guard against a possible mistake plaintiff stopped momentarily and hearing nothing started the team forward in an ordinary walk. He and his companions continued to look towards the northeast and to listen but none of them became aware of the presence of the approaching train until an instant before the danger signal was sounded, when it was too late to prevent a collision owing to the fright of the horses.

The petition alleges that "defendant negligently failed to sound the whistle of the locomotive engine eighty rods before approaching the crossing and to continue to sound the same at intervals until said crossing was passed and failed to ring the bell thereon at a distance of eighty rods from said crossing and to keep said bell ringing until said locomotive had crossed the highway."

We have stated the facts of the case from the viewpoint of plaintiff's evidence and since we are asked to consider no other questions than those presented by the demurrer of defendant it will not be necessary to refer to the evidence of defendant which tended to show that the engineer gave the proper signal for the crossing and that the injury was caused by plaintiff's own negligence.

Assuming, as we must, that neither the whistle was sounded nor the bell rung for the crossing and that

the train which was light was running down grade with so little noise that an attentive person in the situation of plaintiff could not hear it and because of the obstructions to vision could not see it, we do not hesitate in declaring that the evidence of plaintiff warrants the conclusion that defendant was negligent in the operation of the train and that its negligence was the proximate cause of the injury.

The statute (Sec. 3140, R. S. 1909) imposed the duty on defendant to signal for that crossing and the failure to give the signal *per se* was an act of negligence. [Gratiot v. Railway, 116 Mo. 450; Petty v. Railway, 88 Mo. 306; Herring v. Railway, 80 Mo. App. 562; King v. Railroad, 143 Mo. App. 279.] Proof that no signal was given raises an initial presumption that such failure was the proximate cause of the injury and casts the burden on the company of showing that it was not such cause. [Crumpley v. Railway, 111 Mo. 152.] Facts and circumstances in evidence give aid to this presumption and the question of proximate cause is presented by all the evidence as one involving an issue of fact for the jury to solve. It is a fair inference that plaintiff and his companions who were not inattentive would have heard the signal had one been given and thereby would have been enabled to avoid the collision. But counsel for defendant argue that plaintiff was guilty of contributory negligence in law in driving into a dangerous position after he knew a train was approaching from the northeast.

It is true a railroad track is a warning of danger and that on approaching a railroad crossing one must use his senses for his own protection and must not rely entirely on the presumption that the company will perform its duty with reference to the giving of signals but the duty of the traveler on the highway who has a right to use the crossing and to expect that his right will be acknowledged is to use ordinary—not extraordinary care—such care as an ordinarily

careful and prudent person in his situation would observe under such circumstances. We cannot say that plaintiff was guilty of negligence in law. He stopped, looked and listened and not being apprised that a train was approaching, on defendant's track, and believing the train he had heard whistle was on one of the other roads, proceeded forward slowly and attentively. The only thing he could have done that he did not do would have been to stop the team in a place of safety and go forward on foot to a place from which he could have seen the train. To hold as a matter of law that he should have done this would be to hold him to the exercise of extraordinary care. Had the issue of contributory negligence been tendered by the answer we would say that the conduct of plaintiff was an issue of fact for the jury to determine. Certainly he was not negligent in law. The case is very similar in vital respects to that of *Mitchell v. Railroad*, 122 Mo. App. 50, and we refer to our opinion in that case for a more extended discussion of the rules we find controlling the present case. The court properly overruled the demurrer to the evidence.

The judgment is affirmed. All concur.

NANNIE M. JOHNSON, Respondent, v. HARTFORD LIFE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, June 17, 1912.

1. **LIFE INSURANCE: Illegal Assessments: Abandonment.** An assessment policy was issued to the assured in 1888, and he paid all assessments until May, 1902, when he failed to pay the one levied at that time, or any subsequent ones. He died in 1907. The unpaid assessment was illegal because it was levied to pay losses, which could be paid out of funds in the hands of the insurer, or under its control, applicable to the payment of

such losses. *Held*, that the policy was not forfeited by the failure to pay such illegal assessment.

2. ———: ———: ———. A certificate holder in an assessment company cannot be put in the wrong and subjected to the penalty of forfeiture until he neglects or rejects a lawful demand, and, if the assessment in question was illegal, the insurer is without legal justification in refusing to pay the loss.
3. ———: ———: **Burden of Proof.** Where the policy holder was in good standing up to the time he defaulted in the payment of an assessment, the burden is on the insurer to show affirmatively the existence of facts on which it predicates its right to declare a forfeiture and to prove that the assessment was necessary, was not excessive, and was levied in the manner prescribed in the contract.
4. ———: **Abandonment.** Where a certificate holder in an assessment company fails to pay an assessment, illegally levied, within the period provided for payment and thereafter has no further communication with the insurer, his silence cannot be tortured into acquiescence in the forfeiture of his policy.

Ellison, J., *Dissenting (Separate Opinion)*.

Appeal from Henry Circuit Court.—*Hon. C. A. Denton*, Judge.

AFFIRMED. CERTIFIED TO THE SUPREME COURT.

Jones, Jones, Hocker & Davis, Wash Adams and Lewis Sherry for appellant.

Fyke & Snider and Parks & Son for respondent.

JOHNSON, J.—In 1888, defendant, a life insurance company incorporated under the laws of Connecticut, issued to James T. Johnson, a citizen of Henry county, an assessment policy in its "Safety Fund Department" by the terms of which it agreed "that ninety days from the receipt by the president or secretary of said company of satisfactory proofs . . . of the death of the herein named member, while this certificate is in force, all the conditions hereof having been conformed to by the member, there shall be due

and payable, out of the aforesaid mortuary fund, and not otherwise, the indemnity of five thousand dollars . . . to his wife, Nannie M. Johnson."

The assured died in January, 1907, and, claiming the certificate was in force at the time of his death, plaintiff, his widow, brought this suit to collect the indemnity therein provided.

The answer pleaded "that the certificate required the assured to pay periodical assessments; that five years before his death assessment numbered 95 was levied against him for \$74.55; that the call was dated May 2, 1902, and became due June 1, with a grace period expiring June 20, that at the request of the assured the time of payment of this assessment was extended to July 5, that payment was not made and in consequence of the default the certificate was forfeited and that the assured acquiesced in the forfeiture and abandoned his membership and certificate." The reply was a general denial.

Plaintiff admits that such assessment was levied, that her husband received notice thereof and that he failed to pay it, but she contends the assessment was illegal; that its non-payment did not work a forfeiture of the policy and that her husband did not acquiesce in the forfeiture nor abandon his insurance. A trial of the issues resulted in a verdict and judgment for plaintiff and the cause is here on the appeal of defendant.

In *King v. Insurance Co.*, 133 Mo. App. 612, we had before us a similar policy issued by defendant and, as in the present case, a forfeiture was claimed on account of the failure of the assured to pay an assessment levied shortly before his death. That assessment, numbered 91, fell due in March, 1901, and the plaintiff met the defense of forfeiture with the claim that the assessment on which it was founded was illegal. She prevailed in the circuit court and we affirmed the judgment. The main issues in that case were the

same as those now before us, though our concern then was with an assessment levied in March, 1901, and now is with one levied in May, 1902. Now, as then, the validity of the assessment depends on the solution of questions raised by the policy and practices of defendant in relation to the conduct of its business, particularly that part of the business known as the "Safety Fund Department." We find the evidence in the present record differs in some respects from that considered in the King case. Defendant insists these differences distinguish the two cases in all vital particulars and, therefore, that the opinion in the King case should not be accepted as decisive of this case. We shall consider that contention after stating the facts disclosed by the record in hand.

In 1880 defendant, which, prior to that year had been doing an "old line" insurance business, established its "Safety Fund Department" and, thereafter, and until 1899, issued new policies out of no other department. The safety fund business was conducted on an assessment plan but the members—as they were called—were merely policy holders and had no voice in the management of the business. In 1899, defendant discontinued issuing new policies out of this department and returned to "old line" business. It continued the business accumulated in this department but deaths and lapses have reduced the number of members to one-third the number holding policies when the department ceased taking new business. The plan of the Safety Fund Department was as follows:

At the time of the delivery of each certificate of \$1000, the assured paid an admission fee of eight dollars (which went to the soliciting agent as a commission) and a further fee or deposit of ten dollars to be placed in the "Safety Fund." Thereafter, he was required to pay expense dues of three dollars per annum to defray the expenses of conducting the business. Provision was made for the payment of death

losses out of a "Mortuary Fund" raised by assessments levied on the policy holders. The safety and mortuary funds and the management of them by defendant furnish the field of controversy and the relation of their history and their condition at the time of the levy of assesment No. 113 is necessary to a proper understanding of the questions of law argued by counsel. The foundation of the safety fund consisted of the deposits of ten dollars on each certificate of \$1000. As fast as they were received defendant turned such deposits over to the Security Company of Hartford who held and administered the fund thus acquired as trustee under the terms of a trust agreement executed December 31, 1879, by the Security Company and defendant. A copy of this agreement was printed on each certificate issued by defendant. Material provisions thereof are as follows:

"Whereas, The party of the first part (defendant) purposes to issue to persons contracting therefor, certificates of membership in a special department of its business to be known as the Safety Fund Department, and in consideration of the sum of ten dollars to be received on each one thousand dollars of the amount of each and every such certificate for the purpose of creating a safety fund, to insert therein sundry agreements with such persons in the following words, to-wit:

"That said company will deposit said sum of ten dollars, when received, with the trustee, named in a contract made with it (of which a copy is printed hereon), as a safety fund in trust for the uses and purposes expressed in said contract; and shall at the expiration of five years from July 1, 1879, if said safety fund shall then amount to three hundred thousand dollars, or whenever thereafter said sum shall be attained, make a semi-annual division of the net interest received therefrom by it, pro rata among all the holders of certificates in force in said department at such

times, who shall have contributed five years prior to the date of any such division their stipulated proportion of said fund, by applying the same to the payment of their future dues and assessments; and that, whenever said fund shall amount to one million dollars, all subsequent receipts therefor shall be divided by the said company in like manner as the interest."

"Said company further agrees that if at any time, after said fund shall have amounted to three hundred thousand dollars, or after five years from January 1, 1880, if that amount shall not have been attained before that date, it shall fail, by reason of insufficient membership, or, shall neglect if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate issued in said department, and such certificate shall be presented for payment to said trustee by the legal holder thereof, accompanied by satisfactory evidence, as hereinafter provided, of its failure to pay, after demand upon it within the time herein stipulated for limitation of action then it shall be the duty of said trustee to at once convert said safety fund into money and divide the same (less the reasonable charges and expenses for the management and control of said fund), among all the holders of certificates then in force in said department, or their legal representatives, in the proportion which the amount of each of their certificates shall bear to the amount of the whole number of such certificates in force; and that in such event it shall file with said trustee a correct list, under oath, of the names, residences and amounts of the certificates of all members entitled to participate in such division. The evidence referred to above to be either certification by said insurance company's president or secretary that a claim is justly and legally due and that payment thereof has been demanded and refused, or the duly attested copy of a final judgment obtained thereupon in any court of competent jurisdiction, satisfaction of

which has been neglected or refused for the period of sixty days from its date. . . . "That, as often as the sum composing such fund shall be in amount sufficient to purchase one thousand dollars, par value, of United States bonds, said trustee shall make investments of such funds therein and register the same in its name as trustee of the safety fund of the said insurance company, and, provided no default by the party of the first part as hereinbefore recited shall occur, shall accumulate said fund and the income thereof (less the reasonable compensation and expenses), for five years from July 1, 1879, or until such time thereafter as said fund shall amount to three hundred thousand dollars, par value, of the bonds purchased for said fund, when the party of the second part will pay over to the party of the first part, semi-annually thereafter, all the further income from said fund (less the accruing and unpaid compensation and expenses) to be by the party of the first part used for the purposes mentioned in the hereinbefore recited agreements: And, unless such default shall occur, will thereafter add to the principal of said fund the deposits thereafter received from the party of the first part, exclusive of the income therefrom, until the whole fund shall amount in such bonds, at their par value, to one million dollars; and in the event of the failure or neglect mentioned in the hereinbefore recited agreements, will convert said fund into money and divide the same in accordance with the hereinbefore recited agreements, as soon as can reasonably be done after the necessary information of the proper persons and their shares shall have been obtained. Said party of the first part hereby agreeing to put the party of the second part in possession of the information required for the making of a proper division thereof as agreed with its certificate holders."

The safety fund reached its contractual limit of one million dollars sometime before 1899, and one of

the issues contested at the trial and submitted to the jury was whether or not defendant and the trustees had suffered the fund to increase beyond that limit instead of dividing the surplus among the policy holders. On the face of the reports made by defendant to the insurance department of this state, it appears that a surplus was being accumulated in the hands of the trustee and, further, it appears that defendant had accumulated and was maintaining a large reserve fund and also was maintaining a standing mortuary fund.

The report filed December 31, 1900, contains the items:

“Net Safety Funds in Security Company of Hartford, Conn.\$1,112,569.14
Reserve on Safety Fund policies..... 230,220.00
Mortuary Fund held in addition to reserve 111,495.36”

The report filed December 31, 1901, which was the last report preceding the alleged lapse of the policy in suit showed \$1,166,905.02 in the safety fund; \$262,257.00 in the “reserve on safety fund policies” and \$116,313.59 in “the mortuary and other funds.”

These reports show that defendant had built up funds which its contracts with policy holders did not authorize, consisting, at the close of business in 1901, of \$166,905.02, surplus in the safety fund, \$262,257,000 in the reserve fund and \$116,313.59, in the mortuary fund, making a total of \$545,475.61. Had the assured, when notified of the call for the 95th assessment, examined this report (and it was open to his examination) he could have reached no other conclusion than that defendant was maintaining and increasing a great reserve fund it has no right to maintain and which greatly exceeded the total of the death losses the 95th assessment was levied to pay.

In other words the report, which was made under oath and filed in pursuance of the insurance laws of

this state, disclosed that the 95th assessment was illegal because it was levied to pay losses which could be paid out of funds in defendant's hands or under its control applicable to the payment of such losses. But it is contended by defendant that its evidence conclusively disproves these solemn statements. It appears from that evidence that there was no surplus in the safety fund and that the apparent excess consisted of the safety fund in its "Woman's Department" and not of a surplus in the fund belonging to the "Men's Department" and that the item "Reserve in Safety Fund Policies" was not what it purported to be but referred to a fund applicable to policies of another class. As to the mortuary fund, that evidence shows that it varied and at the time of the call for the 95th assessment was less than \$50,000 but it appears beyond question from the testimony of defendant's president that defendant kept on hand a standing mortuary fund out of which it paid losses promptly without waiting to levy an assessment to pay them, and that assessments were levied, not for the payment of unpaid death claims, but to replenish the mortuary fund. By this practice, policy holders were assessed to pay anticipated death losses before and not after their occurrence.

Returning to the items of excess in the safety fund and reserve on safety fund policies, we hold the evidence of defendant is not conclusive and, to say the least, the verified reports made to the Insurance Department were of sufficient evidentiary potency to raise an issue of fact to go to the jury. On their face these reports are clear and unequivocal. They do not mention a woman's department, and they purport to speak of the two funds under consideration only as funds belonging to the department out of which the policy in suit was issued. The statements in those reports are so radically and importantly antagonistic to the evidence adduced by defendant as to preclude the

thought that an honest mistake might have been made in them. The only permissible conclusion is that defendant either knowingly misstated vital facts in the reports or has distorted them in its evidence. The jury were entitled to accept the reports as veracious and to reject the contradictory evidence.

Taking up the mortuary fund again, we pass to the contention of defendant that its right to maintain a margin in that fund equal to the proceeds of one assessment was adjudicated in a decree entered in the Superior Court of New Haven county, Conn., in the case of Dresser et al. v. Hartford Life Ins. Co. (the present defendant) and others. That was a suit in equity begun in 1906 by thirty-one certificate holders against defendant, the trustee of the safety fund and certain officers of defendant to obtain an accounting and the appointment of a receiver on the ground of mismanagement and intended misappropriation of funds belonging to policy holders. The lower court sustained the demurrer to the petition and on the appeal of plaintiffs to the Superior Court of Errors, the judgment was reversed and the cause remanded for further proceedings. We quote from the opinion:

“The language of the certificate is that ‘if at any time it (the insurance company) shall fail by reason of insufficient membership, or shall neglect, if justly and legally due, to pay the maximum indemnity provided for by the terms of any certificate, . . . it shall be the duty of said trustee (the security company) to at once convert said safety fund into money, and divide the same . . . among the holders of certificates then in force. . . .’ The plaintiffs claim that by this provision there must be such a division of the safety fund among the certificate holders, when their number becomes so reduced that the aggregate amount of their insurance does not exceed \$1,000,000, as would be the case when there were but 1000 holders of certificates at \$1000 each. The claim of the insur-

ance company, as stated in paragraph 29 and admitted by the demurrer, is that, even after the number of certificate holders are so reduced, it may continue to collect dues and to make mortuary assessments, unlimited in the average amount, and unrestricted by the number of certificate holders, and to declare the rights of certificate holders forfeited who fail to pay such dues and assessments. If the insurance company may so continue to levy assessments unlimited in amount, it is difficult to see when there can be a failure to pay certificates by reason of insufficient membership, or how the certificate holders have much protection from the existence of the so-called safety fund. Which of these constructions is the correct one depends upon what is meant by the provision, if the insurance company shall 'fail (to pay the amount of any certificate) by reason of insufficiency of membership.' Clearly by the word 'fail' is not meant a default in any obligation assumed by the insurance company. While the company undertakes to make the assessments (*Lawler v. Murphy*, 58 Conn. 295, 20 Atl. 457, 8 L. R. A. 113), and to pay the sum collected, its express agreement is to pay the amount of certificates from 'the mortuary fund, and not otherwise.' If, after an assessment for the payment of the amount due upon a certificate is properly made and the assessment paid, the amount realized proves insufficient to pay the indemnity due, the failure is that of the mortuary fund, and not of the insurance company, and there can be no such failure of the mortuary fund, 'by reason of insufficient membership,' unless there is a fixed maximum limit of assessment. The certificate fixes such a limit. It provides that the payment of 'mortality calls' to form a 'mortuary fund' for the payment of 'all indemnity matured by the deaths of members' are to be levied 'according to the table of graduated mortality ratios given hereon, and as further determined by their respective ages, and the aggregate indemnity at the dates of such deaths

. . .’ In the application, which is by its terms made a part of the contract of insurance, each member agrees to pay ‘all mortality calls determined as within set forth.’ Attached to Exhibit B is a table showing the method of determining mortuary calls and the ratios graduated according to ages of certificate holders for assessments against each holder of a \$1000 certificate, for the collection of a death loss of \$1000. This method is based upon a minimum outstanding insurance of \$1,000,000. There is no other method provided by the contract, and therefore none for the making of mortality calls after the total amount of outstanding insurance falls below \$1,000,000. It is expressly stated that these ratios will decrease as the total amount of outstanding insurance increases. There is no suggestion that they can ever be increased. It must be held that they cannot. Even if it is doubtful which of the two claimed constructions of the contract should be adopted, the doubt should be resolved in favor of the insured. [Liverpool & L. & G. Ins. Co. v. Kearney, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 460; Fricke v. U. S. Indemnity Co., 78 Conn. 188, 192, 61 Atl. 431.] The demurrer to the first prayer for relief in so far as it applies to that part of the prayer which asks that the certificates be construed as providing that when the amount of the face of outstanding certificates is reduced to \$1,000,000 the safety fund is to be distributed among the certificate holders should have been overruled. Since the contract may be construed as above stated, it should not be reformed as requested.”

The case was remanded to the New Haven County Superior court where a decree was rendered March 23, 1910. The court found, as we find, that defendant constantly carried a margin or reserve in the mortuary fund and speaking of that practice, said:

“The plaintiffs claimed it was improper and wrongful to accumulate these margins and to carry this balance in said mortuary fund, and claimed that said

balance of margins should be distributed among the outstanding certificate holders; but it is held that it is proper and reasonable that the company should hold some such fund for the purpose of enabling it to pay losses promptly, but it is not necessary for that purpose that the company should hold more than the amount of one average quarterly assessment for the previous year. Said fund belongs to the certificate holders and is held in trust for them and the Hartford Life Insurance Company has the right to hold the same to the extent above stated in trust for said certificate holders and for application to the settlement of death claims and said fund should be ultimately distributed in the settlement of death claims as hereinafter provided, before said certificates in accordance with their provisions are extinguished and the safety fund distributed in accord with the judgment of this court."

It was adjudged that when the amount of the outstanding certificates "falls to the face amount of one million dollars and the safety fund is distributed among the holders of said certificates the balance, if any, of said mortuary fund remaining in the hands of the Hartford Life Insurance Company, shall be distributed pro rata among the certificate holders whose certificates are outstanding at that time."

Defendant argues: "Perhaps it will be urged that this opinion and judgment is no more than persuasive authority. But, if it is only this, surely it ought to persuade. It would be little less than abominable if the company was controlled as to the management of these funds by divergent view of numerous different courts, for then neither the company, the insured, their lawyers nor the courts could ever possibly tell what were the company's rights and duties with respect to these funds. On principles of comity, this court should incline to follow and adopt the rule there laid down. But we submit that the case is something more than

merely persuasive authority. It is the opinion, judgment and decree of the court in which this fund is actually being administered and by the decrees of which the defendant is bound, and the defendant being bound thereby, the rights of the beneficiaries of these funds ought not to be determined by a rule variant from that by which the company is bound to administer the fund. The mortuary fund, which the defendant has maintained, it has been adjudged right and proper for it to maintain by the courts of Connecticut."

The Superior Court of Errors is a court of last resort for which we entertain the highest respect and we are willing to accord the decision of that court the same effect that would be given it by that court itself if this case were before it for determination. The two cases are not identical in parties, cause of action, or decisive issues. Plaintiff was not a party to that suit; there was no question of the forfeiture of her rights involved therein, the issues before us were not considered in that case and there is nothing in the opinion from which we quoted to sustain the contention of defendant that it had a right to maintain a surplus in the mortuary fund. The New Haven County Superior Court is not a court of last resort and its decrees are no more persuasive than would be the decree of a trial court in this state.

Plaintiff stands on entirely different ground from that occupied by the plaintiffs in the Dresser case. This is an action at law and defendant is standing on a forfeiture alleged to have occurred automatically by Johnson's failure to pay an assessment. The law abhors forfeitures and courts will indulge in no presumption to aid them. Under the admission that Johnson was a certificate holder in good standing up to the time he defaulted in the payment of the 95th assessment, the burden was on defendant to show affirmatively the existence of the facts on which it predicated its right to declare a forfeiture. No presumption of

right acting in the levy will be entertained but on the contrary, defendant will be held to prove that the assessment was necessary, was not excessive, and was levied in the manner prescribed in the contract. [Earney v. Modern Woodmen, 79 Mo. App. 385; Agnew v. A. O. U. W., 17 Mo. App. 254; Puschman v. Ins. Co., 92 Mo. App. 640; Hannum v. Waddill, 135 Mo. 153; Stewart v. A. O. U. W., 46 S. W. 579 (Tenn.); 2 Bacon on Benefit Soc. (3 Ed.), sec. 377.] A certificate holder in an assessment company cannot be put in the wrong and subjected to the penalty of forfeiture until he neglects or rejects a lawful demand. If the assessment in question was illegal, defendant was without legal justification in refusing to pay the loss.

Defendant argues it was necessary to maintain a margin in the mortuary fund in order that losses might be paid promptly. That argument might have weight but for two facts: First, the contracts with policy holders expressly provided that assessments for the mortuary fund should be levied only for the payment of losses already matured by death and, in effect, forbade the maintenance of a reserve in that fund and, second, there was no business reason to serve by anticipating the regular method prescribed in the contracts for the payment of the death losses for the reason that the department was not taking new business and continuing members could not complain as long as defendant was observing the terms of their contracts. Doubtless it would be reasonable for a going assessment company *to provide in its contracts with members* for the maintenance of a reserve in the mortuary fund to pay death losses promptly, but it is indefensible for a company retired from active business to levy assessments for such purpose *in violation of the terms of its contracts with members.*"

It matters not how reasonable it might have been to keep on hand a surplus fund. The contract did not permit it and in declaring a forfeiture defendant

elected to stand on the strict letter of the contract and will not be heard to complain of the unreasonableness of its terms. We conclude that the jury were entitled to find from the evidence that the assessment in question was illegally levied and that defendant had on hand in the safety, reserve, and mortuary funds a sufficient fund for the payment of all accrued death claims.

The defense of abandonment we find is not well founded. Johnson did ask for an extension of time which was granted. After the expiration of that period, he had no further communication with defendant and his silence cannot be tortured into acquiescence in the forfeiture. He had no voice in the affairs of the company and, therefore, was not required to protest or appeal to defendant for redress. Nor was it required of him to make a tender of subsequent assessments, if any, that were lawfully levied, for that would have been a vain and useless formality. In the case of *Wayland v. Insurance Company*, decided at this term, we considered at length the subject of abandonment in such cases and refer to our opinion in that case for a full discussion of the subject.

In conclusion we reaffirm our decision in the *King* case and apply it here as far as it may be applicable to the present facts.

The judgment is affirmed. *Broadbush, P. J.*, concurs; *Ellison, J.*, dissents in separate opinion.

DISSENTING OPINION.

ELLISON, J.—The following was prepared as the opinion of the court, but my associates not being satisfied therewith, prepared, in opposition thereto, that part of the opinion on the subject of abandonment, in *Wayland v. Western Life Indemnity Co.*, and rest their decision in this case on what is said by them in that case.

This action is based on a certificate of membership and life insurance in an assessment company, issued to James T. Johnson on the first of November, 1888, for the sum of five thousand dollars, payable to his wife out of a mortuary fund made up by assessment of members. Johnson died on the 15th day of January, 1907. After issuing the certificate, the company changed its name to that of Hartford Life Insurance Company, by which name it is sued. The company refusing to pay the amount of the insurance, this action was instituted by the widow. The company claims that Johnson failed to pay an assessment due in June, 1902, and thereby and by force of the express provisions of the contract, his insurance ceased at that time. It likewise claims that Johnson abandoned the contract and acquiesced in its termination. The widow claims that there was an excess surplus in the mortuary fund and that the assessment was unnecessary, unauthorized and void, and that a forfeiture could not follow its non-payment. A peremptory instruction to find for defendant was refused and judgment rendered for plaintiff.

The certificate of insurance was issued in consideration of Johnson paying certain annual dues and all mortality assessments for the maintenance of a mortuary fund, and dues for the creation of a safety fund. The payments of mortality calls, or assessments, were to be made quarterly, on the first day of March, June, September and December of each year. Thirty days' notice of each assessment was to be given the assured, and it was agreed that the certificate was issued on "the express condition that if either the annual dues, mortality calls, or safety fund deposit, are not paid to said company on the day due, then this certificate shall be null and void and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate

was in force, either from the company or the trustee of the safety fund. And a failure to make the stipulated payments shall absolutely terminate the member's liability therefor."

There were also stipulations contemplating applications for reinstatement by the member who had lapsed.

It was further stipulated that the following part of the application was made a part of the contract: "If I or my representatives shall omit or neglect to make any payment as required, in respect of amount, place and time of payment, by the condition of such certificate, then the certificate to be issued hereon shall be null and void, and all moneys paid thereon shall be forfeited to said company."

Johnson paid his dues and all quarterly assessments from his entrance as a member in 1888, until that due the first day of June, 1902, a period of near fourteen years. He received proper notice of the June assessment of \$74.55, but failed to pay. But it appears that the notice sent to Johnson complying with the contract in that respect, had a statement at the close thereof that if payment of the assessment due the first of June was not received at the home office by the 5th of June, a second notice would be sent by registered letter, giving until June 20th to make the payment. It is then stated that: "After June 20th, the limit allowed for payment under the registered notice, the company reserves the right to require a medical examination as a condition of reinstatement." This second notice was sent to Johnson giving him until the 20th of June. He paid no attention to it until the 19th, one day before the limit would expire and too late to get the payment to the home office in time. Then his son Garland wrote the following letter (which he afterwards approved) to the company: "My father and I both have been out of town and did not get to attend to payment due on policy 109854, Hartford

Life & Annuity Insurance Co., on life of Jas. T. Johnson. I see our time expires tomorrow. What steps can we take now to make payment and have it reinstated. Father is in perfect health. I am very sorry indeed for the delay, but it could not possibly be avoided. Kindly let us know by return mail."

In due course, June 24, the company answered this letter, again extending the time, until July 5th. It reads: "As you wrote us before the last day of grace expired for payment of the June call, policy No. 109854, we are warranted in extending the time of payment, and have given you until July 5th to renew the policy. If, therefore, you wish to remit us \$75.55 on or before that date, the policy will be kept in force."

But again Johnson failed to pay and neither he nor the company had any further correspondence. Relations between them there ended and nothing connected therewith transpired until subsequent to his death, near five years thereafter. He had been in regular receipt of semi-annual dividends on his certificate down to three months before his default. Though payment of dividends to him thereafter ceased and though no further assessments were ever made against him, he never uttered a complaint nor gave a sign that he considered himself any longer a member of the company, or connected with it, contractually or otherwise. Is it not manifest to any reasonable man that Johnson considered his connection with the company had ceased? He knew (his contract so informed him) that the whole scheme of insurance which he had been enjoying for fourteen years by paying each year his quarterly assessment, was based upon assessments of members scattered throughout the country; that each one's security—the payment of the insurance to each one's beneficiary—depended upon the payment by the others of their assessments. And he must necessarily have regarded his ceasing to pay, as ending his con-

nection with the company. And such is the law; it is the law even though the assessment which was not paid was not authorized by the contract, for that cannot control the effect of an abandonment. [Mutual Life Ins. Co. v. Hill, 193 U. S. 551; Mutual Life Ins. Co. v. Phinney, 178 U. S. 328; Mutual Life Ins. Co. v. Sears, 178 U. S. 345; Ryan v. Mutual Reserve Fund, 96 Fed. 796; Smith v. New England Mut. L. Ins. Co., 63 Fed. 769; McDonald v. Grand Lodge, 21 Ky. Law, 883; Lone v. Mutual Life Ins. Co., 33 Wash. 577.] In the cases cited from the Supreme Court of the United States the opinions are by Justice BREWER. In the first of these, according to the statement of facts, at page 551, the assured took out insurance and paid one premium. Notice of the second one was given, and he failed to pay. He was not asked, nor did he pay, any succeeding premiums for four years, when he died. The plaintiff in that case relied upon the fact that no notice of forfeiture was given. On the other hand, "the defendant relied upon the non-payment of the premiums other than the first, and an abandonment of the contract." The defendant was a resident corporation of the state of New York, while the assured resided in the state of Washington and took his insurance there. The laws of the state of New York required a notice of forfeiture to be given the assured before one could be effected. The court held that even though the New York law applied and a forfeiture could not be taken without giving notice to that effect, yet the assured had abandoned the contract by his continued failure to pay the annual premiums. At page 559 of the report, it is said that: "Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defenses to avoid payment, and in like manner should they set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left

unpaid." The court then cites and approves *Lone v. Ins. Co.*, supra.

In the latter case the assured paid one premium and lived twelve years without paying any more, and, as in the former, his representatives contended that thirty days' notice of forfeiture should have been given as required by the New York statute. The court held that though that were true, yet the assured had acquiesced in the company's position, paid no further premiums and could not recover. In the course of the opinion it is said that: "We are satisfied that the thought never occurred to Rex (the assured) during his life time that he had a claim against the company on the policy which had been issued so many years before, or, if he did, after the lapse of any appreciable time, it was a dishonest thought, for he knew that he had not performed the duties which devolved upon him under the contract, and that he had no rights thereunder; and there seems to be no just reason why his administrator should demand rights which he had virtually waived."

In *McDonald v. Grand Lodge*, supra, an assessment company, in 1882, issued a certificate of insurance on the life of McDonald payable to his wife as beneficiary. In January, 1886, he surreptitiously left home and his wife paid the assessments called for between January and October. But at the latter month the company refused to receive future assessments and notified her of his suspension and failed to notify her of any subsequent assessments. Nine years thereafter McDonald died and the beneficiary brought an action on the certificate. The court held that having acquiesced in the suspension, without further effort, for nine years, the claim could not be asserted.

In *Mutual Life Ins. Co. v. Phinney*, supra, the assured paid the first year's premium and failed to pay for two years, when he died. A short time before the second premium became due, he said he could not

pay and asked the agent if he would take his note for it. This was refused. Four weeks afterwards and after the premium was due, he informed the agent that he had the money and could pay. The agent informed him that now, he would have to get a certificate of health. The assured said he could not, as he had been rejected by another company. A few months afterwards the agent requested the assured to let him have the policy to use in canvassing. The assured, remarking that it had lapsed, gave it to him. The assured died in less than two years and it was held that he had abandoned the contract.

In *Smith v. New England Mut. L. Ins. Co.*, supra, the policy was dated May 24, 1890, and the assured paid the two first annual premiums. The question was whether he paid the third, due in 1892, or was excused from doing it. He died November 22, 1893. The company treated him as in default for failure to pay and refused a subsequent offer to pay, because, as it claimed, the policy had lapsed. Nothing further transpired, and he died in less than two years. His widow was allowed to recover the paid-up value of the policy, under the provisions of a statute, but was denied the right to a judgment for the amount insured, on the ground of his acquiescence in the lapsing of the policy. The court said: "The assured acquiesced in the company's position—that his policy had lapsed—and accordingly neither paid nor tendered subsequent premiums, but treated the policy as a security simply for the interest acquired under the statute. Had his life been continued the claim now made would never have been urged or thought of; his early death alone suggested it. Had he lived ten years longer without payment or tender, this claim would then have been as reasonable as it is now."

In *Ryan v. Mutual Reserve Fund*, supra, the assured took out a benefit certificate in 1886 and paid his assessments until February, 1898. On the 26th of

March, 1898, he wrote the company he would not pay that assessment because of its increased amount, and would "quit." In less than six months thereafter he died. The court held that notwithstanding the company had no right to increase the assessment, yet he abandoned the contract instead of contesting the assessment. That there were two modes of action open to him, to contest the assessment he considered to be illegal and unjust or to abandon the contract, and that he chose the latter. The court, in this connection, said, "the case is not one wherein the company is seeking, after the death of the insured party, to establish a right to declare the contract of insurance forfeited by reason of a failure to meet some of its requirements; but the question is whether the insured did not, during his life time, affirmatively put an end to the contract, so that it had, by his action, been terminated before his death."

The question has arisen in the courts of this State and has been answered in harmony with the foregoing cases. [Gladson v. Supreme Lodge K. of P., 50 Mo. App. 45; Miller v. Grand Lodge, 72 Mo. App. 499; Lavin v. Grand Lodge A. O. U. W., 112 Mo. App. 1; Bange v. Supreme Council Legion of Honor, 128 Mo. App. 461; McGeehan v. Ins. Co., 131 Mo. App. 417.] In the first of these there was a void expulsion and forfeiture. The member failed to pay an assessment of July 1, 1882, and died in less than two years. In his life time he made no objection and took no steps questioning the act, and it was held that he acquiesced and the beneficiary could not recover. It was stated in the opinion (page 57 of the report) that an expelled member *owed a duty to his fellow members* to at least make known his objection to the measures taken against him. That the rights of a member are only contractual rights and his being illegally cut off from membership is no more than a breach of contract which the member may, at his election, affirm or disaffirm. It was

stated (pp. 58, 59) that a member cannot rest indefinitely under his illegal treatment without making protest, and if he does, he disables his beneficiaries to deny acquiescence and recover against the company a sum the paying members must satisfy. It was also said (p. 59) that certificates of insurance, like in that case, involved a scheme of mutual insurance (and so does the one in this controversy) under which the living members contribute a certain sum to make up a fund for the benefit of the widow and children, or other beneficiary, of a deceased brother. The court, speaking through Judge Thompson, said (p. 59) that: "There is an obvious injustice in requiring them to make a contribution to pay such a benefit to the family of a deceased member, who has for a long time ceased himself to make any contribution on his part; and this is so, although he may have ceased in consequence of a void suspension or expulsion, which he has taken no steps to resist or disaffirm, but in which he has passively acquiesced. We take the just rule to be that, even in the case of a void expulsion or suspension, the expelled or suspended member is under a duty to his co-contributors to affirm or disaffirm the act of expulsion or suspension within a reasonable time, and in some distinct manner under the circumstances; and that where he takes no steps of any kind to secure his reinstatement, allows dues which had accrued and were payable *prior* to the date of his expulsion to remain unpaid, and neither tenders such dues nor any subsequently accruing dues, he must be taken to have acquiesced in and consented to the sentence of expulsion or suspension."

In the second of the last cited cases the same rule is stated by Judge BOND.

In the third of the last cited cases, Judge GOODE, writing the opinion for the St. Louis Court of Appeals, approved of the cases to which we have just referred. The facts were that a member took his certificate of

insurance in 1899. He failed to pay the assessment for September, 1900, and died in about ten months thereafter. He was suspended upon his failure to pay, and to the day of his death did not pay, or offer to pay, any monthly assessments; nor did he take any steps to question his suspension or to show his dissatisfaction therewith. It was said (p. 14) that: "It was incumbent on "a member of a benefit society, when unlawfully suspended or expelled, to act thereafter as a member, if he wished to enjoy the rights and privileges of one; that he might not behave as though the rules of the order were no longer binding on him, perform none of his duties, pay none of his dues and assessments, and still retain the same privileges and benefits he would enjoy if he was carrying his share of the society's burdens. A suspended member must either acquiesce in his suspension or protest against it—must keep his insurance *cum onere*. If he does not protest formally and by words, he must treat his membership as still subsisting, not alone for the purpose of giving rights, but for the purpose, as well, of imposing burdens. He cannot elect to regard it as at an end, so far as the obligation to pay dues and assessments and comply with the other rules of the order is concerned, but in existence as far as his certificate of insurance is concerned. He must treat himself as in the order for all purposes or as out of it."

In the fourth case, the rule was again stated by the St. Louis Court of Appeals in the following language, at page 475 of the report; "It is the doctrine of this court, as well as of the tribunals of other jurisdictions, that by remaining silent after he is notified of a void expulsion or suspension, a member of a fraternal society will forfeit his rights in the society, including his insurance. This is because the existence of such associations depends on the prompt payment of dues, and they would be destroyed if members were allowed, after a suspension technically invalid, to re-

tain their insurance without paying assessments. As has been pointed out in other opinions such a rule would put a suspended member on a better footing than an active one, because the former would continue to enjoy his insurance without paying for it; whereas the latter would pay. Bange died in March, 1905, four or five months after his suspension and seven months after he had paid any dues. If he received notice of the action of the council and did nothing if the premises, nor treated himself as a member of the order and bound to contribute to its burdens no recovery can be had on his benefit certificate."

The last of these cases arose in this court. It there appears that the assured had a New York policy of insurance issued to him in that state while he was a resident thereof, on which he paid premiums from 1883 to 1895, when he ceased further payments for a period of eight years. It was the law of New York that there could not be a forfeiture of a policy without first giving thirty days' notice of the intended forfeiture, and as this was not done it was contended that the policy was a subsisting obligation and that the assured was entitled to the amount insured less the premiums he had not paid. But it was held that notwithstanding the provision as to forfeiture, the fact that the assured ceased to pay premiums for a period of eight years, showed an abandonment. We said that: "It must be conceded that so far as plaintiff's rights are concerned he was at liberty to abandon and rescind the contract. He did not merely neglect a single payment of premium, nor several, but he abandoned all pretense of recognition of the contract for a long series of years. There is no law nor policy to prevent him, defendant consenting thereto, from giving up his contract."

Furthermore, the propriety and justness of the rule, thus repeatedly announced, having recently received the endorsement of the Supreme Court of this

state, is not open for further discussion. [Konta v. St. Louis Stock Exchange, 189 Mo. 26.] That case involved the right of membership of one claiming to be a member of a stock exchange, whose place had been forfeited and he expelled for alleged non-payment of dues. At page 39 of the report, the court said: "But even assuming, as contended by plaintiff, that Mr. Konta was a member of the St. Louis Stock Exchange, and that his expulsion was undoubtedly illegal, as it certainly was if he was ever a member of the exchange, he was bound, within a reasonable time after obtaining knowledge of such expulsion, to assert his rights; otherwise, he will be deemed to have consented to such expulsion, however illegal or irregular it may have been."

The court then proceeded to approve *Gardon v. Supreme Lodge Knights of Pythias*, supra, and then added that:

"In this case plaintiff ascertained through his agent, Mr. Ten Broek, in April or May, 1901, that he had been expelled from the St. Louis Stock Exchange for non-payment of dues. He had allowed dues to accrue which were payable on January 1, 1900, July 1, 1900, and January 1, 1901. He has at no time tendered these dues, nor any dues which accrued subsequently and prior to the institution of this suit, to-wit, dues payable July 1, 1901, and January 1, 1902. Nor did he take any steps whatever to set aside his alleged illegal expulsion until June 9, 1902."

Let it be conceded that an assessment insurance company conducts its business by irregular and illegal methods, and in addition to that, illegally suspends a member and forfeits or terminates his policy. Does it follow that the member is to receive *free* insurance during his life? If the insurance on the life of a man is wrongfully terminated by the company when he is twenty-five years old, and he lives to the age of seventy five, may he pay no more and, without protest, sit idly

by during the intervening fifty years, insured all the while, and leave a live policy at his death? If he may for five years, as in this case, he may for fifty, as in the supposed case. New members come into these associations and old ones go out by death, lapses, etc. The new ones come in on the faith of the liabilities and present business appearance of the company. Can a member be permitted to allow the termination of his policy to continue without protest, or objection in any form, thereby inducing persons to become members on the faith that he has no prospective claim on the company, and yet his representative, years afterwards, compel these members to pay the policy the same as if nothing had occurred? The deceased was a physician—a man of intelligence—he knew the basis upon which the company was founded, its mode of insurance and manner of collecting funds to pay death losses. He knew that he was dropped from membership of the company, and never asked for reinstatement. It was his duty to act in accord with the natural thought and bent of any reasonable man, and have taken some step in opposition to this action, if he meant to look upon the insurance as a subsisting contract. Not having done so, it is inconceivable that he considered himself connected with the company at the time of his death.

Plaintiff has found no way to meet the foregoing suggestions except by the bare assertion that Doctor Johnson had a right to remain passive; and further, that acquiescence or abandonment was not pleaded and that no instructions were asked on that head. We have already shown that, in the circumstances here involved, passivity is acquiescence. The answer of defendant does especially plead the acquiescence of Johnson for five years up to his death. There was no dispute in the evidence on this point and the defendant asked the only instruction it could ask consistently with the law as we have stated it, and that was a per-

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empty direction to the jury that plaintiff had not made a case on the evidence and could not recover. This the court refused, and, I think, erred in so doing.

I deem the decision of the majority in conflict with *Konta v. St. Louis Stock Exchange*, 189 Mo. 26; and the following decisions of the St. Louis Court of Appeals: *Glardon v. Supreme Lodge K. of P.*, 50 Mo. App. 45; *Miller v. Grand Lodge*, 72 Mo. App. 499; *Lavin v. Grand Lodge A. O. U. W.*, 112 Mo. App. 1; *Bange v. Supreme Council Legion of Honor*, 128 Mo. App. 461. The case should therefore be transferred to the Supreme Court for final determination.

EARL GODWIN, Respondent, v. NATIONAL COUNCIL KNIGHTS AND LADIES OF SECURITY, Appellant.

Kansas City Court of Appeals, June 17, 1912.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: Forfeiture: Walver.** Prompt payment of dues and assessments may be waived by a course of dealing with the insured, notwithstanding the certificate provides that no waiver of forfeiture shall be valid unless in writing signed by an officer of the association.
2. ———: **Invalid By-Law.** The provision of a by-law of a fraternal beneficiary association that "the receipt and retention of unpaid delinquent dues and assessments in case a suspended member is not in good health shall not have the effect of reinstating such member or entitling him or his beneficiary to any right under his certificate" is invalid.
3. ———: **Walver.** The act of a fraternal beneficiary association in receiving and retaining a member's dues and assessments after the appointed time for payment and without protest until after the death of the member, is a waiver of the cause for forfeiture.

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4. ———: Estoppel. A fraternal beneficiary association is estopped from declaring a forfeiture, for non-payment of dues and assessments within the time provided, by its manner of doing business in receiving the delinquent assessments of its member and treating them as reinstated members of its order.

Appeal from Buchanan Circuit Court.—*Hon. W. K. Amick*, Judge.

AFFIRMED.

W. E. Stringfellow for appellant.

The demurrer to the evidence should have been given. Under the provisions of the contract of insurance, plaintiff's rights are governed by the laws of 1908. *Richmond v. Supreme Lodge*, 100 Mo. App. 8; *Lewine v. Knights of Pythias*, 122 Mo. App. 547; *Gruewell v. Knights & Ladies of Security*, 126 Mo. App. 496. Our appellate courts hold that failure to pay on time works a self-executing suspension; that suspension results *ipso facto* from non-payment of assessments or dues at the agreed time. *Easter v. Brotherhood*, 154 Mo. App. 456; *Smith v. W. O. W.*, 179 Mo. 119; *Lavin v. Grand Lodge*, 104 Mo. App. 1; *Boyce v. Royal Circle*, 99 Mo. App. 349; *Curtin v. Grand Lodge*, 65 Mo. App. 294; *Harvey v. Grand Lodge*, 50 Mo. App. 472. That "a law of the order, prescribing a forfeiture of the benefit certificate held by the member, as a penalty for his failure to pay, when payable, dues and assessments provided by his contract, is reasonable and will be reasonably enforced by the courts." *Easter v. Brotherhood*, 154 Mo. App. 462. That no judicial determination of suspension is necessary. *Smith v. W. O. W.*, 179 Mo. 119; *McMahon v. Maccabees*, 151 Mo. 522; *Lavin v. Grand Lodge*, 104 Mo. App. 15; *Ellerbe v. Faust*, 119 Mo. App. 653; *Borgraefe v. Knights of Honor*, 22 Mo. App. 127. They hold that a collector appointed by a local lodge is not the agent of the grand lodge and that

his action in receiving assessments from delinquent members does not bind the grand lodge, and is not a waiver. *Burke v. Grand Lodge*, 136 Mo. App. 450; *Lavin v. Grand Lodge*, 104 Mo. App. 1; *Chadwick v. Order of Triple Alliance*, 56 Mo. App. 473. They hold that even if the financier of a local lodge be regarded as the agent of the supreme lodge, he could not bind it in his transactions with a member beyond the scope of his authority. *Harvey v. Grand Lodge*, 50 Mo. App. 478; *Borgraefe v. Knights of Honor*, 22 Mo. App. 141.

Thompson, Griswold & Thompson for respondent.

It is a well-settled law in Missouri that an agreement on the part of an insured to comply with the future enacted by-laws of a society of which he is a member, does not bind him, if such after enacted by-law in anyway impairs the obligation of his contracts or imposes on him an additional burden. *Young v. Railway Mail Ass'n.*, 126 Mo. App. 333; *Morton v. Supreme Council*, 100 Mo. App. 91; *Sisson v. Court of Honor*, 104 Mo. App. 54; *Zimmerman v. Supreme Tent*, 122 Mo. App. 591; *Snail v. Court of Honor*, 136 Mo. App. 434; *Wilcox v. Court of Honor*, 134 Mo. App. 547; *Pearson v. Indemnity Col.*, 114 Mo. App. 288. The appellant waived whatever right it may have had to claim the suspension of deceased, by its long continued practice of allowing the local councils to accept dues out of time, without compelling strict compliance with the laws after said knowledge was brought home to it. *Burke v. Grand Lodge*, 136 Mo. App. 459; *James v. Insurance Co.*, 148 Mo. 10; *McMahon v. Macabees*, 151 Mo. 522; *Warner v. Modern Woodmen*, 119 Mo. App. 228; *Cline v. W. O. W.*, 111 Mo. App. 601; *Nickell v. Insurance Co.*, 144 Mo. 420. The provisions, conditions or exceptions which in any way tend to work a forfeiture of the policy, should be construed

most strongly against those who will receive the benefit therefrom, and most favorably towards those who will be damaged thereby. 1 Cyc. 243; *McFarland v. Mutual Life*, 124 Mo. 204; *Cunningham v. Casualty Co.*, 32 Mo. App. 607; *Leech v. Casualty Co.*, 176 Mo. 654; *McMahon v. Maccabees*, 151 Mo. 542; 2 *Joyce on Insurance*, sec. 1356. The prompt payment of premiums is for benefit of the insurer and may be waived or suspended by it or its agents in express terms, or by its course of conduct with the insured. *James v. Insurance Co.*, 148 Mo. 12; 1 *Joyce on Insurance*, p. 544, sec. 439. Forfeitures are in the interest of the insurer and against the insured and any course of business on the part of the insurer which leads the insured to believe that by conforming thereto a forfeiture of his policy will not be incurred followed by due conformity on his part, will and ought to estop the insurer from insisting upon a forfeiture, although a forfeiture might be claimed under the express letter of the contract. *James v. Insurance Co.*, 148 Mo. 1; *McMahon v. Insurance Co.*, 151 Mo. 522; *Thompson v. Insurance Co.*, 52 Mo. App. 468; *Andre v. Woodmen*, 102 Mo. App. 377. Even though the insurance society or order provides by its by-laws that the officers of the local council are the agents of the members, this does not make them so nor change the law regarding agency. *McMahon v. Maccabees*, 151 Mo. 542; *Andre v. M. W. A.*, 102 Mo. App. 377. The local council is agent of the head council or in this case of the national council. *Jones v. Supreme Lodge*, 86 M. E. 193; *Benefit Soc. v. Watson*, 84 N. E. 29; *Supreme Lodge v. Withers*, 177 U. S. 260; *Grunville v. National Council*, 126 Mo. App. 496.

BROADDUS, P. J.—This suit is to recover on a benefit certificate issued by the defendant, a fraternal beneficiary association, doing business in this state. The defendant, on June 21, 1901, issued to Stella God-

win, nee Singleton, its certificate of life insurance, in which it promised to pay to the beneficiary therein named, upon the death of said Stella, the sum of \$1000; that afterwards the said Stella and the plaintiff, Earl Godwin, became husband and wife; that afterwards at the request of the said Stella to change the beneficiary named in the certificate, the defendant issued a new certificate wherein plaintiff was named as beneficiary and the original certificate was surrendered. On April 15, 1909, Stella Godwin died. Proper proof of death was made, but defendant refused to pay the amount of the insurance certificate on the ground that the insured had not complied with the rules and regulations of the order in the payment of dues and assessments.

The defense to the action is, that the insured failed to pay her dues and assessments for the month of March, 1909, prior to the 1st day of April, 1909, as required by the laws of the order.

The benefit certificate provides that the contract "is and shall be subject to forfeiture for any of the causes of forfeiture which are now prescribed in the laws of the order, or for any other cause or causes of forfeiture which may be hereafter prescribed by this order by the amendment of said laws." Section 83 of the laws in force requires the beneficiary member of the order to be a member in good standing at the time of his or her death in order to be entitled to participate in the beneficiary fund.

Section 103, *idem*, provides; that all assessments and dues be paid without notice and paid before the last day of the month. Section 112 provides, that "the certificate of each member, who has not paid his assessments or dues on or before the last day of the month, shall, by the fact of such non-payment, stand suspended without notice, and no act on the part of the council or any officer thereof, or of the national

council, shall be required as essential to such suspension, and all rights under said certificate shall be forfeited, and not restored until duly re-instated by the member complying with the laws of the order, with reference to re-instatement."

Section 186, *idem*, provides that no member shall participate in the beneficiary fund, who shall at the time of death be delinquent on account of non-payment of monthly dues. Section 114, *idem*, provides that a member suspended for non-payment of dues, may, within sixty days, be re-instated by payment of all arrearages; provided, that he be in good health at such time; and "provided, further, that the receipt and retention of such assessments or dues in case a suspended member is not in good health shall not have the effect of re-instating such member or entitling him or his beneficiaries to any rights under his benefit certificate."

It is provided in section 169, *idem*, that a subordinate council of the organization and its officers are made the agents of its members in making application for membership; "the re-instatement of members; the collection and transmission of all assessments to the national council," etc. But it provides, that the national council "shall not be liable for any negligence in these matters nor be bound by any irregularity, neglect or illegal action by a subordinate council or by any of its officers."

The defense is further made that the insured was not a proper subject for re-instatement because she was not in good health on or after said first day of April, 1909.

In reply the plaintiff alleges, that if the dues and assessments due on the certificate for the month of March, 1909, were not paid until the first of April, 1909, that said dues and assessments were received by defendant, its officers and agents, with full and complete knowledge of her health and physical condi-

tion on April 1, 1909, and on April 12, 1909, when the delinquent dues and assessments for the month of March were paid to and received by defendant. And it is further set up by way of estoppel, that, while the deceased was a member, defendant at times received from her past dues and assessments without objection, and thereby led her to believe that a strict compliance with the laws of the order in that respect was not required; and that it was a habit of defendant to accept dues and assessments after the time provided for their payment, with full knowledge of the facts. It was shown that on three former occasions the head of the association had received and retained dues and assessments from the member with the knowledge that they had not been paid in time, and without a certificate of her good health.

It was shown that the head of the organization did not receive information that the member was not in good health at the time her past dues and assessments were made, until after her death, and that soon thereafter he tendered these back to plaintiff.

The verdict and judgment were for the plaintiff and defendant appealed. There is practically no dispute as to the controlling facts and the question is one of law. There is no question but what the failure of the member to pay her dues within the time provided in the by-laws of the association *ipso facto* worked a suspension of her membership, unless a waiver was shown.

There was a dispute as to the condition of the member's health on the 1st day of April. The evidence tended to show that up to and including April 1st, she was not seriously sick; that she had what was thought a severe cold, and was able to be up and about in her house. Dr. Gray, the attending physician, testified that he saw the member the latter part of March and treated her for a cold, chills and chilly sensations, fever and coughing, at which time he prescribed for

her; that he did not see her any more for a week; that he got daily reports of her condition, which were favorable; that the next time he saw her was somewhere about the 4th, 5th or 6th of April. She had a violent chill and he decided that she had lobar pneumonia. It was the opinion of doctors that the disease of pneumonia must necessarily have begun at the time of Dr. Gray's first visit to his patient, the latter part of March. It was explained that the pneumonia germ exists in the throats of healthy persons, and that in a person enfeebled by a severe cold these germs are liable to develop and produce pneumonia.

It seems that said section of defendant's by-laws in regard to re-instatement of suspended members was not enacted at the time the certificate was issued, but what was known as section 161 was in force. It reads as follows: "Any beneficiary member suspended by reason of non-payment of an assessment or assessments may be re-instated upon the following conditions, and none other, viz.: If living, and in good health as when suspended, and if not engaged in any occupation prohibited by the laws of the order, at any time within sixty days from such suspension, by payment to the financial secretary of the council of all arrearages on account of the assessments and dues, including the pending assessments and dues. Upon such payment being made, the financial secretary shall enter the re-instatement of the member upon the books of his office, and report the same to the council at its next meeting."

The certificate provides that the member shall be "entitled to all rights, benefits and privileges of membership therein (of the order) and at her death, she having complied with all of the provisions of the constitution and laws of the order, now in force, or that may be hereafter enacted," etc. It further provides that: "This certificate and contract is and shall be subject to forfeiture for any cause of forfeiture which

is now prescribed in the laws of the order, or for any other cause or causes of forfeiture which may be hereafter prescribed by this order by the amendment of said laws.”

If the question depended alone upon such issue the plaintiff would have no standing. It will be seen that section 114, in force at the time of the suspension, contains no cause of forfeiture other than that provided in section 161, viz.: non-payment of dues and assessments. But there is a material difference in the two sections in other respects. Section 114 provides, that a receipt and retention of unpaid delinquent dues and assessments in case a suspended member is not in good health “shall not have the effect of re-instating such member or entitling him or his beneficiaries to any right under his certificate,” whereas, there is no such provision in section 161. But we hold that such a provision in said by-law is invalid. The defendant has no legal right to receipt and retain delinquent dues and assessments until the member dies and then assert that there was no waiver of forfeiture. It amounts to an assertion of the right, that, if the member was sick and recovered, the forfeiture was waived, but, if he died, the forfeiture was not waived. It was shown that from twenty-five to thirty-five per cent of the members were delinquent in the payment of their dues. It is held “that such a line of conduct on the part of the order and the members, shows that each understands there is a continuous insurance. Otherwise the situation would be that such member would be an insured member at all times, except the time his beneficiary would need it, viz., at his death.” [Cline v. Woodmen of the World, 111 Mo. App. 601.] Prompt payment of dues and assessments may be waived by a course of dealing with the insured, notwithstanding the policy provides that no waiver of forfeiture shall be valid unless in writing signed by an officer of the association. [Andre v. Modern Woodmen of Amer-

ica, 102 Mo. App. 377; James v. Insurance Co., 148 Mo. l. c. 10; Cline v. Woodmen of the World, *supra*.] And it is there held, in the Andre case, that it would be doing violence to common knowledge and common sense alike to suppose that a benefit society, doing business in every state in the Union, did not know that a large per cent of its members were not prompt in the payment of their dues. And it is held, that with such knowledge, the society waived the delinquencies and received payments within a reasonable time. That defendant did know that the local lodge or its financial agent was receiving the delinquent payments by its members cannot be questioned, and, notwithstanding the by-laws of the order nominated the financier the agent of the members in the receipt of dues and assessments of delinquent members, he became the agent of defendant by his course of dealing with the defendant. [McMahon v. Maccabees, 151 Mo. 522; Andre v. Woodmen, *supra*.] If, however, we look to the duties which the financier was to perform in the receipt of delinquent assessments, he was acting in that capacity as the agent of defendant. It is said: "A subordinate society and its officers are not made the agents of the insured by the fact that the by-laws of the order declare them to be such. The law determines whose agent one is, from the source of his appointments and the nature of the duties he is appointed to perform." [McMahon v. Maccabees, *supra*.] It is the contention of defendant that this rule does not apply to fraternal beneficiary organizations, but we can see no good reason why it should not apply, and it was so applied in Andre v. Woodmen, *supra*, and other cases.

A careful consideration of the evidence has not convinced us that the member was sick within the meaning of the by-laws in question. It is true the cold the member had up to and including the 1st day of April afterwards terminated in pneumonia. Healthy

people have colds and they have the germs of pneumonia in their throats, which may or may not finally result in pneumonia. And it was not contemplated by the by-laws that a "bad cold" would be such a sickness as would prevent one of its delinquent members from being a proper subject for re-instatement. Such a contention would be absurd. But, however that may be, it is clear that the act of defendant in receiving and retaining the member's payment, made only one day too late after the appointed time for such payment, and retaining such payment without protest until she died, was a waiver of the cause of forfeiture. The plaintiff was entitled to recover also on the other ground mentioned, that the financier, when he received the delinquent payment and re-instated the member, was acting within the scope of his authority as agent of defendant under the provisions of its by-laws.

And, furthermore, the defendant is estopped from declaring a forfeiture by its manner of its doing business in receiving the delinquent assessments of its members and treating them as re-instated members of its order. Such being our views of the case it is not necessary to notice other assigned errors. The plaintiff was entitled to a judgment on the undisputed facts. Affirmed. All concur.

WALTER E. WILLIAMS, Respondent, v. CITY OF
ST. JOSEPH, Appellant.

Kansas City Court of Appeals, June 17, 1912.

NEGLIGENCE: Personal Injuries: Ordinances. Plaintiff, a boy over twelve years of age, sued for damages for injuries sustained as the result of falling in an excavation. He was riding a bicycle along a path used by pedestrians on a street without paving or sidewalk and his wheel was deflected and he fell into an excavation that extended about ten feet into the street. There was an ordinance in force at the time making it unlawful for any person over the age of twelve years to ride a bicycle

on any walk, by-way or path used as a public way for pedestrians. *Held*, that plaintiff was a trespasser and not entitled to recover.

Appeal from Buchanan Circuit Court.—*Hon. W. K. Amick*, Judge.

REVERSED.

W. B. Norris, O. E. Shultz and Phil A. Slattery for appellant.

K. B. Randolph for respondent.

BROADDUS, P. J.—The object of this action is to recover damages against the defendant city for injuries plaintiff, a boy over twelve years of age, received as the result of having fallen into an excavation on Twenty-second street. The evidence showed that that part of the street where plaintiff fell into the excavation is mostly unimproved, there being no sidewalks, and no paving. The excavation in question extends into the street about ten feet. Persons passing along the street used any part of the same that was convenient, but at the point in question there was a path used on the west side by pedestrians for a short distance. Plaintiff's bicycle, while he was riding along this path, was, for some cause not stated, deflected from its course and he was thrown into the excavation and injured. It was shown that the excavation had been made by a man by the name of Roth some four or five years previously, who, it is assumed, was one of the city's contractors. The petition alleges that plaintiff was riding on his bicycle "in a path usually used by pedestrians."

The city set up, among others, the defense of one of its ordinances making it unlawful for any person over the age of twelve years to ride a bicycle or similar vehicle "upon or over any sidewalk, by-way, or path

used as a public way for pedestrians in the city of St. Joseph."

Plaintiff gave the required notice to the city of his injury and other particulars required in such cases, but failed to state that such injury was suffered in Buchanan county, Missouri, but, as the case will be disposed of on another point, the omission is not deemed material. The said ordinance of the city was offered and received in evidence, but not read to the jury. Various instructions were offered and given for each side of the controversy, but, as the result rests upon the one offered by defendant as a demurrer to plaintiff's case, it is not necessary to mention them. The finding and judgment were for plaintiff from which defendant appealed.

The plaintiff upon his own showing was not entitled to recover and defendant's demurrer should have been given. It is asserted by plaintiff and admitted by defendant that plaintiff was riding his bicycle in a pathway used as such by the public. The ordinance in question prohibits its use as such and provides a penalty for its violation. The plaintiff was a trespasser and not entitled to recover. [Barney v. By. Co., 126 Mo. 372.] There the plaintiff, a small boy, was injured by jumping on and off a train within the city limits. It was held that he was a trespasser, in that, his act was prohibited by both the statutes of the state and the ordinances of the city. But respondent says that point cannot be raised on appeal as the ordinance was not read to the jury. It was not necessary that it should be. Its effect was a matter of law for the court.

The plaintiff makes an effort to show that the path was not a way in the sense used in the ordinance. He is concluded by the allegation of his petition that it was such. The cause is reversed. All concur.

MARY E. STAR, Appellant, v. ARTHUR H. PENFIELD et al., Respondents.**Kansas City Court of Appeals, June 17, 1912.**

1. **EQUITY: Burden of Proof: Voluntary Disposition of Property: Solvency.** Where in an action in equity to subject shares of stock belonging to the wife, to the payment of a judgment against the husband, it was shown that the husband had made a voluntary disposition of his property, the burden of proof is cast upon him to show that at the time he was solvent and could make such disposition without impairing his ability to pay his debts.
2. **——: Voluntary Conveyance: Fraudulent as to Creditors. Burden of Proof.** A voluntary conveyance is presumptively fraudulent as to existing creditors and the burden of proof is on the donee to repel such presumption and to show that the donor had sufficient means to meet his liabilities.

Appeal from Buchanan Circuit Court.—*Hon. L. J. Eastin*, Judge.

REVERSED AND REMANDED.

W. K. James for appellant.

C. C. Crow for respondents.

BROADDUS, P. J.—This is a suit in equity to subject forty-nine shares of stock of the Marchants' Improvement and Investment Company, belonging to Anna A. Penfield, the wife, to the payment of plaintiff's judgment against her husband, Arthur H. Penfield.

The petition alleges that on the 5th day of May, 1903, she loaned to the defendant Arthur, \$4000, for which he executed to her his promissory note, which was surrendered to him on the 5th day of November, 1906, and a new note taken for said sum with accrued interest; that at the January term of the Buchanan

County Circuit Court for the year 1909, she obtained judgment on said note and interest in the sum of \$4466.67, together with the cost of the suit, on which judgment she sued out an execution directed to the sheriff of said county and a further execution issued to the sheriff of Jackson county, each of which was returned not satisfied; and no part of said judgment has been paid, as the said Arthur has no property out of which any part of the same can be realized by law. The petition further alleges that at the time said loan was made to the said Arthur he and the defendant Anna A. were husband and wife; that at the time of said loan the said Arthur was insolvent and has so continued up to this time; that at the time she loaned the said sum of money to the said Arthur, his wife, Anna, was the owner of forty-nine out of 100 shares of stock in a corporation known as the Merchants' Improvement and Investment Company; and that with the fraudulent intent to defraud plaintiff the said Arthur invested the said \$4000 borrowed from her as aforesaid in the property of his wife owned in said company, he being at the time insolvent as aforesaid.

There are other allegations in the petition which for the purposes of the main point of the controversy and the one on which the court made its finding, are not necessary to be set out in this opinion. The evidence disclosed that plaintiff is the sister of defendant Arthur, and had on deposit on the 5th of May, 1903, over \$5000 in the Bank of Commerce at St. Joseph, Missouri, of which he was president; and we think it was sufficiently shown that the money he borrowed from plaintiff at that date he invested in his wife's property in said company.

The plaintiff introduced some evidence tending to show that defendant Arthur was insolvent when he invested the money, borrowed from plaintiff, to the betterment of his wife's estate. But this evidence was slight and consequently of little probative force. The

court found against the plaintiff on the ground that she had failed to prove the insolvency of defendant Arthur at the time he invested said money in his wife's estate.

It is insisted by plaintiff, that, having shown that defendant Arthur had made a voluntary disposition of his property, the burden was cast upon him to show that at the time he was solvent and could make such disposition without impairing his ability to pay his debts. It is held, that, a voluntary conveyance is presumptively fraudulent as to existing creditors, and the burden of proof is on the donee to repel such presumption. [Walsh v. Ketchum, 84 Mo. 427.] "The burden is on the donee in a voluntary conveyance to show that the donor had sufficient means to meet his liabilities, otherwise the deed will be void as against creditors." [Snyder v. Free, 114 Mo. 360.] And it is so held in *Bank v. Thornburrow & Stone*, 109 Mo. App. 639; *Vandeventer v. Goss*, 116 Mo. App. 316; *Scharff v. McGaugh*, 205 Mo. 344. Such being the law, the court was in error in holding plaintiff to show that defendant Arthur was insolvent at the time he made the voluntary disposition of his means by investing them in his wife's estate. Although plaintiff assumed to a certain extent the burden of so showing, still, we do not think in a case like this where, if the allegations of the petition be true, there is so strong an appeal to the conscience of the court for relief, the plaintiff should suffer merely because she had unwillingly assumed a burden which the law imposed upon the defendants.

After the court had heard all the evidence in the case and had announced its finding, the plaintiff made an ineffectual and untimely effort to obtain a new trial on the ground that she could show defendant's insolvency if afforded an opportunity to do so. But, as the court refused to consider the offer, the matters urged in that respect are not necessary to be considered. As

the case is here on a motion for a new trial, timely filed, the record as made is before us for adjudication.

We do not feel satisfied with the finding of the trial court because of the error in holding that the burden was upon the plaintiff to prove the husband's insolvency. On a new trial the plaintiff will be held to prove to the satisfaction of the court that defendant Arthur employed his own money to the betterment of his wife's estate, which, if so shown, the defendants will assume the burden of showing that the said Arthur was solvent at the time. Reversed and remanded. All concur.

**MARGARET M. MUEHLBACH et al., Respondents,
v. THE MISSOURI AND KANSAS INTERUR-
BAN RAILWAY COMPANY, Appellant.**

Kansas City Court of Appeals, June 19, 1912.

1. **CONTRACTS: Execution of: Intention of Parties.** A party, who signs and delivers an instrument, is bound by the obligations he therein assumes, although it is not signed by all the parties named in it, unless it appears that the parties signing mutually intended that it should be inchoate and incomplete and not to take effect as a contract, until signed by all the parties named.
2. ———: **Breach: Penalty.** Where a contract contains provisions for a progressively increasing scale of monthly payments intended to coerce a speedy vacation of a tract of ground and to impose an interminable and ever increasing punishment for a breach of the contract, a punishment so harsh and oppressive, so disproportionate to the subject-matter as to preclude the thought that the parties had in mind the liquidation of reasonable damages in consequence of a breach, such provisions constitute a penalty and are non-enforceable.

**Appeal from Jackson Circuit Court.—Hon. O. A.
Lucas, Judge.**

REVERSED AND REMANDED.

166 Mo. App.—20

Bowersock, Hook & Hall for appellant.

The instrument on which the suit is based never became a contract binding on the defendant, for the reason that it was never signed by both parties of the second part or delivered as a contract. *Brown v. Rice*, 29 Mo. 322; *Gann v. Railroad*, 65 Mo. App. 670; *Green v. Cole*, 103 Mo. 70; *McCauley v. Schatzley*, 88 N. E. Rep. (Ind.) 972; *Barber v. Burrows*, 51 Cal. 404; 51 Cal. 473; *Fish v. Johnson*, 16 La. Ann. 29; *Wilcox v. Saunders*, 4 Neb. 569; *Crittenden v. Armour*, 45 N. W. Rep. (Iowa); 888; *McDaniel v. Anderson*, 19 S. C. 211; *Arnold v. Scharbauer*, 116 Fed. Rep. 492; *National Bank v. Hall*, 101 U. S. 43; *Gay v. Murphy*, 134 Mo. 98; *Page on Contracts*, secs. 577-579; 9 Cyc. 302. The monthly payments provided for in said instrument were a penalty. *Menger v. Piano Co.*, 96 Mo. App. 283; *Railroad v. Stone, Co.*, 90 Mo. App. 171; *Tinkhorn v. Satori*, 44 Mo. App. 659. Evidence of the rental value of the land was admissible to show that such payments were so intended. It is improper to enter two final judgments in a case. *R. S.* 1909, secs. 2090, 2097; *Russell v. Railroad*, 154 Mo. 428; *Cramer v. Barmon*, 193 Mo. 327; *Boothe v. Loy*, 83 Mo. App. 601; *Mann v. Doerr*, 222 Mo. 1; *Beshears v. Banking Assn.*, 73 Mo. App. 293. The case should have been disposed of as a suit in equity and not at law.

Seebree, Conrad & Wendorff for respondents.

(1) The instrument on which this suit is based is binding on the defendant. (a) Strang was a nominal party. *Hall v. Hall*, 107 Mo. 110; *Hillman v. Allen*, 145 Mo. 638; *Condit v. Maxwell*, 142 Mo. 266; *Crawley v. Crafton*, 193 Mo. 421; *Brandon v. Carter*, 119 Mo. 573. (b) The contract became binding on the appellant because it was signed by the Muehlbachs and the appellant, delivered and acted on by them. *State v. Moore*, 46 Mo. 377; *Mfg. Co. v. Repass*,

75 Mo. App. 420; Gay v. Murphy, 134 Mo. 98; Mattoon v. Barnes, 112 Mass. 463; Dillon v. Anderson, 43 N. Y. 231; Naylor v. Stene, 104 N. W. 685; Edwards v. Gildemeister, 61 Kan. 141; Dairy Co. v. Dairy Co., 70 S. W. 390; Pub. Co. v. Walker, 87 Mo. App. 503. (2) If the contract is valid upon the parties having signed it, is the defendant entitled to any relief on the ground that the rent therein provided for is a penalty? Page on Contracts, sec. 1167; 30 Cyc. 1135; State ex rel. v. Walbridge, 119 Mo. 383; Walker v. Engler, 30 Mo. 130; Hoster v. Lange, 80 Mo. App. 238; Pinson v. Campbell, 124 Mo. App. 263; Jones v. Anderson, 82 Ala. 302; Commissioners v. South Bend, 118 Ind. 68; Dewey v. School District, 43 Mich. 480; Trustees v. Bennett, 27 N. J. L. 513; Stonam v. Waldo, 17 Mo. 489; Brayan v. Spurgin, 5 Snead (Tenn.) 681; Jennings v. Lyons, 39 Wis. 553; Roseberry v. Association, 142 Mo. App. 552. (3) The court did not err in entering two final judgments. Mills v. Paul, 30 S. W. 242. (4) The court did not treat the trial of these cases as a suit at law.

JOHNSON, J.—This suit, commenced in the circuit court of Jackson county, November 27, 1909, is for the recovery of the agreed compensation plaintiffs claim defendant was to pay them for the use of their land for a right of way of a railroad owned and operated by defendant. On December 7, 1909, plaintiffs instituted another suit against defendant in the same court on a promissory note of \$1460 dated January 9, 1908, due eighteen months after date and bearing interest at six per cent per annum from January 1, 1909. It appears from the petition in both cases as well as from the answers filed by defendant that both actions grew out of and depend upon the validity of a certain contract the parties entered into January 9, 1908. Defendant claims this contract is void and prays for the cancellation of both note and contract.

On motion of defendant the two actions were consolidated and tried together in the circuit court without a jury. After hearing the evidence the court rendered judgment for plaintiffs in each case in accordance with the prayers of the respective petitions and defendant appealed from each judgment. This opinion deals with the first mentioned action which for convenience we shall call the action for rent, but as the two cases are so closely related what we shall say will dispose of the questions at issue in the suit on the note.

Defendant is a Kansas corporation operating an electric railroad in that state from a point on the line between Missouri and Kansas known as Thirty-ninth street and State Line to Olathe, Kansas. This point at the times of the events in controversy was the western terminus of the "Roanoke line" of the street railway system of Kansas City operated by the Metropolitan Street Railway Company. Defendant has a traffic agreement with the Metropolitan Company that enables it to operate its cars over the tracks of that company to the central portion of Kansas City. Defendant's road was constructed in 1905, and beginning at its junction with the road of the Metropolitan Company at Thirty-ninth street and State Line took a southwesterly course over a tract of land owned by George Muehlebach which contains about twenty-eight acres, is in Kansas immediately west of the State line, and lies between a prolongation of Thirty-ninth street on the north and Forty-first street on the south. We shall refer to this land hereafter as "tract A." Crossing Forty-first street the road continues on a tangent over a smaller tract owned by Muehlebach which we shall call "tract B." Muehlebach died December 22, 1905, and plaintiffs, with the exception of William Buchholz are his heirs and as such are the owners of the land described. All are of legal age except Carl who is a minor and plaintiff Margaret M. Muehlebach

who is his guardian and curator. In 1905, defendant brought a condemnation suit in the District Court of Wyandotte county, Kansas, the object of which was to secure a right of way over "tract A" and at the same time brought two other suits for the right of way over "tract B." Commissioners were appointed who appraised the damages in the first suit at \$2540 and in the others at \$742. Defendant paid these assessments to the clerk of the court and constructed the road over both tracts doing grading, cutting and filling that damaged the whole of both tracts. Plaintiffs appealed from these awards and these appeals were pending in the district court until January 10, 1908, when they were dismissed by plaintiffs under circumstances to be recounted hereafter.

In 1907, the Metropolitan Street Railway Company contemplated extending its Roanoke line south on Bell street to and beyond Forty-first street and negotiations were begun between defendant and that company for a junction between the two roads at Forty-first and Bell streets in place of the connection at Thirty-ninth street and State Line. Bell street runs north and south, is in Kansas City, Missouri, and is the first street east of State Line. Plaintiffs own the land on both sides of Forty-first street in the blocks between State Line and Bell, and it was the idea of defendant to abandon the road over "tract A" and to run west on Forty-first street from a new junction at Bell street to a connection with its road over "tract B." Accordingly on April 19, 1907, W. B. Strang, who was not an officer of defendant but was a heavy stockholder, acting on behalf of defendant, addressed a letter to plaintiffs in which, referring to a proposal he had received from plaintiffs for a settlement of the pending litigation, he offered a settlement, the prominent features of which were that defendant would abandon the right of way over "tract A" by

January 1, 1908, would continue to use the right of way over "tract B," would establish a terminal at Forty-first and Bell streets on the land of plaintiffs, for all of which it would allow plaintiffs the sum of \$742, paid into court for their benefit in the condemnation suits affecting "tract B" and in addition would pay plaintiffs \$4000 for the use of "tract A" to January 1, 1908, and for the land required for the new terminal.

This proposal was acceptable to plaintiffs but for some reason was not reduced to a formal contract. Shortly after January 1, 1908, the attorney of plaintiffs and Albert F. Hunt, defendant's president, resumed negotiations for a settlement which resulted in the execution of the contract now in dispute. This contract which stated on its face that the contracting parties were plaintiffs, spoken of as parties of the first part, and defendant and W. B. Strang, parties of the second part was signed by plaintiffs and defendant but not by Strang who, at the time, was in New York. After the contract was signed it was forwarded by Hunt to Strang for his signature. He refused to sign but plaintiffs were not advised of his refusal until about March 1st when Hunt informed them that Strang had rejected the contract and that he did not consider defendant was bound by it. Hunt admits that, as president, he had authority to execute the contract on behalf of defendant but based his repudiation of the contract on the ground that the refusal of one of the parties to sign absolved the others.

The material provisions of the contract thus may be stated: Plaintiffs were to dismiss their appeals in the condemnation suits, give the right of way over "tract B," give defendant the use of land for the new terminal at Forty-first and Bell streets and pay most of the costs of the condemnation suits. Defendant was to remove the road from "tract A" and level off the cuts and fills on that tract, was to allow plaintiffs to

receive the deposit of \$742 on account of the right of way on "tract B," was to execute a quitclaim deed to plaintiff covering the right of way on "tract A" and was to pay plaintiffs in addition the sum of \$4000, as follows: Defendant was to obtain and pay over to plaintiffs the deposit of \$2540 made in court on account of "tract A" and execute and deliver the promissory note in suit for \$1460. No obligation or duty of any kind was imposed on Strang nor was any benefit to be derived by him from the contract. He was made a party for the reason that defendant being a Kansas corporation could not transact business on the Missouri side of the line and it was contemplated that the business relating to the new terminal would be conducted in his name.

Immediately after the contract was signed by plaintiffs and defendant both parties treated it as a complete and binding contract. Plaintiffs' attorney and defendant's president went together to Kansas City, Kansas, and obtained the two deposits. The one of \$2540 was received by Hunt and paid at once to plaintiffs' attorney as a payment on defendant's obligation of \$4000. Each paid his part of the costs of the condemnation suits and plaintiffs' attorney dismissed their appeals "with prejudice." On behalf of defendant Hunt executed and delivered a quitclaim deed to the right of way on "tract A" and plaintiffs' attorney filed the deed for record. Apparently it was contemplated by both parties that the new terminal and connection with the Metropolitan road would be made in the immediate future but in addition to the other benefits to plaintiffs we have enumerated, the contract contained provisions designed to accelerate the removal of defendant's road from "tract A." The substance of these provisions was that beginning January 1, 1908, defendant should pay a rental of fifty dollars per month to plaintiffs for the right of way on that tract until the removal of the road. If the road

was not removed by the end of the first six months, the rental for the next six months was to be seventy-five dollars per month; for the third six months \$100 per month, for the fourth six months \$125; for the fifth, \$175; for the sixth, \$225, and so on indefinitely, increasing the rental \$50 per month for each additional period of six months.

At the time the present suit was brought the Roanoke line still ended at Thirty-ninth street and State Line and defendant, *ex necessitate*, still connected with that line at that place and operated its road over "tract A." The demand alleged in the petition is for the rent that accrued during the period beginning January 1, 1908, and ending December 1, 1910, amounting in all to \$1975 for twenty-three months. At the present time the rental of the tract computed according to the progressively ascending scale of the contract is \$375 per month and if we should uphold this provision of the contract, defendant now would be indebted to plaintiffs on account of rent from December 1, 1910, in the sum of \$6075. And if defendant should remain five years longer, it would have to pay about \$40,000 more for the use of a right of way the entire value of which for all time was assessed at \$2540 in the condemnation suit. For the next ten years the rental would be over \$160,000.

I. It appears to be conceded that the right of plaintiffs to recover in the present suit and in the companion suit on the promissory note depends on the validity of the contract of January 9, 1908. In both suits plaintiffs found their actions on that contract and, accepting the position thus tendered, defendant assails the validity of the contract on two grounds, viz., first, that it "never became a contract binding on the defendant" and, second, that the provision for monthly payments for the use of the right of way over "tract A" was intended as a penalty to coerce per-

formance of the contract by defendant and not as an agreement for the payment of rental or of liquidated damages for a breach of the contract by defendant. We shall determine these questions in the order of their statement.

In support of the first proposition counsel for defendant argue that inasmuch as the contract on its face purported to include Carl Muehlebach among the parties of the first part and W. B. Strang as one of the parties of the second part, the instrument did not become effective as a contract and, therefore, did not bind the signatory parties for the reason that it was not signed by these two parties. Carl Muehlebach was a minor and, of course, his signature to the contract would have had no effect to bind him or his estate and the contract must be construed not as providing for the procurement of his signature, which would have been a vain and useless act, but as binding the first parties who were *sui juris* to procure a signature that would bind his interest and estate in the subject-matter of the contract. This burden was discharged by the first parties when they procured the duly authorized signature of his guardian and curator who signed the contract in his behalf with the approval of the probate court having jurisdiction over his estate.

Nor do we regard as sound the contention that the contract is void because of the refusal of Strang to sign it. The contract imposed no obligation on Strang and secured no benefit to him. Defendant was the only party of the second part that assumed any obligation or was to secure any advantage. We concede defendant would have had the right to require that the contract should not go in effect unless signed by Strang, though apparently he was but a nominal party but defendant did not take such position. On the contrary its president who had full authority to act in its behalf did not wait to procure the signa-

ture of Strang but, in conjunction with plaintiffs, proceeded at once to perform the contract and thereby secured benefits for defendant in a way to disclose the existence of a mutual intention that the contract should be considered as binding on the parties who had signed it. The rule applicable to such cases is that a party who signs and delivers an instrument is bound by the obligations he therein assumes although it is not signed by all the parties named in it unless it appears that the parties signing mutually intended that it should be inchoate and incomplete and not take effect as a contract until signed by all the parties named. [State ex rel. v. Sandusky, 46 Mo. 377; Donnell Mfg. Co. v. Repass, 75 Mo. App. 420; Gay v. Murphy, 134 Mo. 98; Mattoon v. Barnes, 112 Mass. 463; Dillon v. Anderson, 43 N. Y. 231; Grafeman Dairy Co. v. St. Louis Dairy Co., 96 Mo. App. 495; Naylor v. Stone, 104 N. W. (Minn.) 685; Edwards v. Gilde-meister, 61 Kan. 141; American Pub. Co. v. Walker, 87 Mo. App. 503.] And the burden is on the party attacking the contract to show that when he signed it was agreed that the contract should not take effect until signed by all the parties. [Authorities, *supra*.]

It would be most unjust to suffer defendant to derive all of the benefits the contract conferred and then repudiate its obligations on the ground of a lack of mutuality as to parties. The contract bound the parties who signed it and the promissory note executed by defendant in pursuance of its provisions is a valid obligation which defendant must discharge.

II. The second proposition relates exclusively to the case in hand. Was the so-called rental agreement in legal intendment a penalty intended to coerce performance of the contract? If it was it cannot be enforced. [2 Page on Contracts, sec. 1167 *et seq.*] "A contract for a penalty" says this author, "is an agreement to pay a stipulated sum in case of default, in-

tended to coerce performance, to punish default, or to secure payment of the actual damages. A contract for liquidated damages is a contract by which the parties in advance of breach fix the amount of damages which will result therefrom and agree upon its payment." Whether the stipulated payments of so-called rent should be classed as a penalty or as liquidated damages for the non-performance of the agreement of defendant to vacate "tract A" is a question of law for the court to solve in the light of the subject-matter of the contract and the intention of the parties. [May v. Crawford, 150 Mo. l. c. 530.] In this case it is said: "If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, the courts will incline to give the relief which the parties have agreed on. But, if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term liquidated damages will not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties. [1 Sedg. on Dam. (8 Ed.), sec. 396.] Where the subject-matter of the contract is such that the damages for its breach can be computed with certainty by definite rules, the courts will usually treat the sum agreed upon as a penalty; especially if there is great disparity between the agreed sum and the actual damage. Such contracts are those for the payment of money, and those in which the market price affords a certain standard for the measure of damages. But if from the nature of the contract the damages cannot be calculated with any degree of certainty, as when that which is the subject-matter of the contract has no precise market value, or there are peculiar circumstances contemplated by the contract, the stipulated sum will be held to be liquidated damages."

It is manifest the stipulation in question was not intended as a letting of "tract A" or to create the relation of landlord and tenant between plaintiffs and defendant and it is a misnomer to speak of the stipulated payments as a rental. The parties intended that "tract A" should be vacated just as soon as the new terminal could be established and the obvious purpose of providing a progressively increasing scale of monthly payments was to coerce defendant into a speedy vacation of the right of way over that tract and to impose an interminable and ever increasing punishment for a breach of the stipulation, a punishment so harsh and oppressive, so disproportionate to the subject-matter of the stipulation as to preclude the thought that the parties had in mind the liquidation of the reasonable damages that would be sustained by plaintiffs in consequence of a breach by defendant. The stipulation for damages must be regarded as a penalty and, therefore, as nonenforceable. Plaintiffs are entitled to recover in this action on account of defendant's breach but the measure of their damages is the actual loss sustained by them in consequence of defendant's occupation of "tract A." Such damages are susceptible of accurate measurement. The judgment is reversed and the cause remanded. All concur.

ALTEN M. WALKER, Appellant, v. JOHN W.
FRITZ, Respondent.

St. Louis Court of Appeals, May 7, 1912. Motion for Rehearing
Overruled July 2, 1912.

1. **APPELLATE PRACTICE: Abstract: Motion for New Trial: Record Proper.** That a motion for a new trial was filed must appear from the abstract of the record proper, and it is not sufficient that it appears from the bill of exceptions.
2. ———: ———: ———: **Necessity of Showing Timely Filing.** The appellate court cannot infer that a motion for a new trial was filed at the term at which the trial was had, merely because it was filed the next day after the verdict was returned and the judgment rendered, but the abstract of the record proper must show that it was filed at the same term.
3. ———: **No Motion for New Trial: Scope of Review.** Where the abstract of the record proper does not show that a motion for a new trial was filed at the term at which the trial was had, the petition, answer, reply and judgment are the only matters for consideration, and, in the absence of any error therein, the court must affirm the judgment.

Appeal from Pike Circuit Court.—*Hon. David H. Eby*, Judge.

AFFIRMED.

Pearson & Pearson for appellant.

Elliott W. Major and *John W. Matson* for respondent.

CAULFIELD, J.—Action upon a note for \$5000 conceded to have been given by respondent to appellant in consideration of certain abstract books, maps, plats and insurance business sold by the defendant to the plaintiff. The defense was want and failure of consideration, in that plaintiff did not turn over to the defendant any insurance business, and in that the abstract books, maps and plats were so incomplete and so replete with errors as to be utterly worthless, con-

trary to plaintiff's warranty and contrary to his representations, which the answer alleges were false and fraudulent, etc.

The verdict and judgment were for the respondent (defendant) and the appellant (plaintiff) has appealed.

In the view we take of the abstract, it is unnecessary to set forth the pleadings or deal with the evidence. The record proper shows that the case was called for trial, both parties answered ready, and evidence was heard, on December 26, 1906, and that the verdict of the jury was returned and filed and judgment was rendered, on January 2, 1907. The judgment is set out in full. Then follows this language: "January 3, 1907—Plaintiff files his motions for new trial and motion in arrest of judgment. March 14, 1907.—Motions for new trial and in arrest of judgment are each by the court overruled." There is absolutely nothing in the record proper anywhere to show or even indicate that the motion for a new trial was filed at the same term at which the trial was had. It is not sufficient that that fact appears from the bill of exceptions. Under repeated rulings of our Supreme Court, it must appear from the abstract of the record proper. [*Flanagan Milling Co. v. City of St. Louis*, 222 Mo. 306, 308, 121 S. W. 112; *Pennowsky v. Coerver*, 205 Mo. 135, 136, 103 S. W. 542; *Harding v. Bedoll*, 202 Mo. 625, 631, 100 S. W. 638; *Keaton v. Weber*, 233 Mo. 691, 693, 136 S. W. 342.] Nor can we infer that the motion was filed at the same term because it appears to have been filed the next day after the verdict was returned and filed and the judgment rendered. "We can take knowledge of the beginning of a term of court but not its ending. It may be in session one day or longer. . . . Neither are we required to presume that it was during the term. The abstract should so show." [*Harding v. Bedoll*, supra, l. c. 632.] Neither is there here, as there was in *Bank*

v. Hutton, 224 Mo. 42, 123 S. W. 47, and Nickey v. Leader, 235 Mo. 30, 138 S. W. 18, anything in the abstract of the record proper, from which it may be inferred that the trial term had not been adjourned until court in course when the motion was filed. There is nothing in this abstract of the record proper from which we can see that the motion was filed at the trial term or at any term at all. Upon this state of the abstract there is nothing before us for consideration except the petition, answer, reply and judgment, and as we have been unable to discover anything therein to warrant a reversal of the judgment, and the appellant suggests nothing, it is incumbent upon us to affirm the judgment. [Keaton v. Weber, supra, l. c. 694; State v. Fawcett, 212 Mo. 729, 738, 111 S. W. 562.] We may say in passing, however, that it is extremely distasteful to us to have a case go off on a point like this. For that reason we adopted our Rule 33, requiring a respondent, in case he wishes to question the sufficiency of the abstract, to file his objections in writing within ten days after the abstract has been served upon him, distinctly specifying the supposed defects and insufficiencies of the abstract, and to serve a copy of such objections upon the appellant. Where respondents have failed to comply with this rule, we have, where possible, treated the supposed defects and insufficiencies as waived, and dealt with the cases on their merits. In this case, however, the respondent has met all the requirements of the rule, and we granted appellant ten days time and opportunity to amend his abstract so as to cure the defects and insufficiencies which respondent had specified, including the one under consideration, but the appellant, though amending his abstract in other respects, did not amend in this one, and left it incumbent upon us, under the decisions, to sustain the point and affirm the judgment.

The judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

ELLEN GORMAN, Appellant, v. CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY et al., Respondents.

St. Louis Court of Appeals, July 2, 1912.

1. **STATUTE OF LIMITATIONS: Permanent Nuisance: When Statute Commences to Run.** Where a nuisance is permanent in character and causes damage which will continue so long as it remains, the entire damage, present and prospective, accrues as soon as the condition causing it comes into existence and is discoverable, and hence it is the subject of a single action, which is barred when not brought within the period of limitation after its accrual.
2. ———: ———: ———: **Railroads: Embankments: Waters and Watercourses.** The building of solid railway embankments, permanent in character, which immediately caused surface water to back up and overflow adjoining land and which would continue to have that effect so long as they remained, caused a permanent nuisance, an action for damages for the maintenance of which, not commenced for sixteen years, was barred by the Statute of Limitations; and whether the five or the ten-year statute was applicable is not determined.
3. **NUISANCES: Railroads: Maintaining Embankments: Waters and Watercourses.** In an action for damages against a railroad company, the petition alleged that the waters gathered by defendant's embankments "stood upon defendant's property and formed a pond thereon, into which defendant drains or permits to drain or flow other waters, slops and filth from a roundhouse, a boarding-house and privies in the vicinity; that said pond overflowed defendant's said property and onto plaintiff's said property and at times covers and stands upon the whole thereof, carrying and depositing said filth thereon; that the waters in said pond are and always have been foul, and emit foul odors and the deposit of said filth on plaintiff's said property, etc." *Held*, that the word "permits" was not used in the sense of passively suffered, but the petition should be construed as charging defendant with affirmative action in permitting waters other than surface water and slops and filth to drain into the pond and overflow upon plaintiff's land.
4. **STATUTE OF LIMITATIONS: Continuing Nuisance: Railroads: Embankments: Waters and Watercourses.** Although a landowner's cause of action against a railroad company, for water flowing on his land in its natural volume, by reason of embankments, is barred by the Statute of Limitations, yet he

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would have a cause of action for the pollution and artificial increase of the waters which overflowed and thereby damaged his land, by reason of the railroad company's actively permitting other waters, slops and filth to drain into the pond formed by its embankment, and which overflowed such land, since that is not a natural and necessary consequence of the original erection of the embankment and could not have been recovered for in a single suit in advance, and hence is not barred by reason of the fact that the action for damages resulting from the overflowing of the waters in their natural volume is barred.

5. ———: ———: Five-Year Statute: Waters and Water-courses. A cause of action for damage to land by actively permitting polluted water to overflow the same is barred by the five-year Statute of Limitations (Section 1889, Revised Statutes 1909).

Appeal from St. Louis City Circuit Court.—*Hon. George H. Williams*, Judge.

REVERSED AND REMANDED.

Kinealy & Kinealy for appellant.

(1) A landowner who gathers waters upon his land and then casts them upon the premises of another is liable in damages and can be enjoined. *Paddock v. Somes*, 102 Mo. 226; *Grant v. Railroad*, 149 Mo. App. 306; *Lewis v. Springfield*, 142 Mo. App. 84; *Ready v. Railway*, 98 Mo. App. 467. (2) Where the nuisance is an abatable one, successive actions for damages must be brought, and any damages suffered within the proper Statute of Limitations may be recovered. *Pinney v. Berry*, 61 Mo. 359; *Schoen v. Kansas City*, 65 Mo. App. 134; *Bielman v. Railway*, 50 Mo. App. 151; *McGowan v. Railway*, 23 Mo. App. 203. (3) The prayer of the petition is not part of the statement of the cause of action. *McGrew v. Railway*, 87 Mo. App. 250; *Emmert v. Meyer*, 65 Mo. App. 609; *State ex rel. v. L. & L. Co.*, 161 Mo. 664.

Robert & Robert for respondent.

(1) When the fact appears upon the face of the petition that the action is barred by the Statute of Limitations, such can be taken advantage of by demurrer. State to use *v. Bird*, 22 Mo. 470; *Boyce v. Christy*, 47 Mo. 70; *Coudrey v. Gilliam*, 60 Mo. 98; *Henoch v. Chaney*, 61 Mo. 129; *State ex rel. v. Spencer*, 79 Mo. 314; *Gas Co. v. City*, 11 Mo. App. 55; *Bur-rus v. Cook*, 117 Mo. App. 384, 215 Mo. 496. (2) When injury inflicted is of a permanent character and goes to the entire value of the estate, but one recovery can be had and suit not brought until after the statute has run cannot be maintained. *Bird v. Railroad*, 30 Mo. App. 365; *Bunten v. Railroad*, 50 Mo. App. 414; *Powers v. Railroad*, 71 Mo. App. 540, 158 Mo. 104; *James v. City*, 83 Mo. 567; *Howard Co. v. Railroad*, 130 Mo. 652; R. S. 1899, secs. 4262, 4272, 4273 (now R. S. 1909, secs. 1879, 1888, 1889). (3) As the petition alleges that the St. Louis, Keokuk & Northwestern Ry. Co. erected the structure complained of, the defendants, being grantees, are not liable. *Bunten v. Railroad*, 50 Mo. App. 422; *Wayland v. Railroad*, 75 Mo. 548. (4) An owner of low land may prevent the flow of water upon his own land even though his obstruction turns it back upon the land of another. *Thompson v. Railroad*, 137 Mo. App. 62; *McCormick v. Railroad*, 57 Mo. 433; *Hoester v. Hemsath*, 16 Mo. App. 485; *Abbott v. Railroad*, 83 Mo. 282; *Rychliki v. City*, 98 Mo. 497; *Gray v. Shreiber*, 58 Mo. App. 173; *Collier v. Railroad*, 48 Mo. App. 398; *Railroad v. Schneider*, 30 Mo. App. 620; *Schneider v. Railroad*, 29 Mo. App. 68.

STATEMENT.—This suit was commenced in the circuit court of the city of St. Louis on December 24, 1909. The trial court sustained a demurrer to plaintiff's amended petition and the plaintiff declining to plead further judgment went in favor of defendant

upon both counts. Whereupon the plaintiff duly prosecuted her appeal to this court. The said amended petition, omitting caption, proceeded as follows:

“Plaintiff, by leave of court, files this, her amended petition, and states that the defendants are corporations and plaintiff is the widow of Francis Gorman, who died at the city of St. Louis on or about the 7th day of June, 1904, leaving a last will and testament whereby after bequeathing the sum of five dollars to each of his children he devised and bequeathed to plaintiff all other property, whether real, personal or mixed, which he owned at the time of his death; that at the time of his death the said Francis Gorman was, and for over twenty years immediately prior thereto had been, the owner of a parcel of ground lying, being and situate in the said city of St. Louis, and described as follows, to-wit: A tract of land situated in United States survey No. 926, having a front of 660 feet on the south line of Aurora avenue, and extending southwardly between parallel lines for a distance of 341 feet, eight inches and thence southwardly to the center line between Aurora and Humboldt avenue, on which center line it measures 620 feet, said tract being composed of lots 31 and 32 of that part of the subdivision entitled Garden Suburb by John How, which lies east of the Wabash Railroad, excepting therefrom the triangle off of the southeast corner conveyed to the St. Louis, Keokuk & Northwestern Railroad company; that the said will of said Francis Gorman was duly admitted to probate by the probate court of said city of St. Louis and his estate has been duly administered in said court and finally settled, and all the debts thereof and all the legacies provided for in said will have been duly paid, and plaintiff, ever since the death of said Francis Gorman, has been and still is the owner of said real estate and of the claim against defendants for all the damage done to said real estate as hereinafter set forth, and which

accrued to said Francis Gorman during his lifetime; that on or about the 1st day of February, 1892, the St. Louis, Keokuk & Northwestern Railroad Company became the owner of a tract of ground which bounded plaintiff's said ground on the east and also on the south; that the natural lay and conformation of all the ground in said vicinity is such that the drainage of the surface water is towards the south and east into Harlem creek and the Mississippi river; that on or about the 1st day of January, 1893, the said railroad company built a high railroad embankment on its property running in a general northeasterly and southwesterly direction, which passed within a few feet, to-wit, fifty feet, of the southeast corner of plaintiff's said tract of ground, and from said embankment at a point near the said southeastern corner of plaintiff's said property the said railroad company built another railroad embankment branching off from the first one mentioned and curving around towards the west and lying south of the south line of plaintiff's said property; that on or about the 1st day of September, 1897, the said railroad company for a nominal consideration conveyed so much of the said property owned by it adjoining plaintiff's property on the south as was not required for its railroad embankments to the defendant St. Louis and Kansas City Land Company, but said last named defendant held said ground for the use and benefit of said railroad company until the latter sold out to the defendant railroad company and since the said land company has held and now holds same for the use and benefit of the defendant Chicago, Burlington & Quincy Railroad Company and said last named defendant controls said St. Louis and Kansas City Land Company and controls the said land, and the use thereof; that on or about the 1st day of January, 1901, the said St. Louis, Keokuk & Northwestern Railroad Company sold, conveyed and delivered all its railroads and property of every kind to

defendant Chicago, Burlington and Quincy Railroad Company and as part of the consideration therefor the latter company assumed all debts, liabilities and obligations of said St. Louis, Keokuk & Northwestern Railroad Company; that the said railroad embankments are solid embankments about fifteen feet high without any openings, ditches, pipes or culverts that would drain the water that came against the same; that by reason of the want of such provisions for drainage, water gathers and ever since said embankments were built always has gathered against said embankments and stood upon defendants' property and formed a pond thereon into which defendants drain or permit to drain or flow other waters, slops and filth from a roundhouse, a boarding house and privies in the vicinity; that said pond overflowed defendants' said property and onto plaintiff's said property and at times covers and stands upon the whole thereof, carrying and depositing said filth thereon; that the waters in said pond are and always have been foul and emit foul odors and the deposit of said filth on plaintiff's said property and the said overflow thereof has depreciated the value thereof \$3700; that by reason of the overflow of plaintiff's said property and its liability to be so overflowed as aforesaid neither plaintiff nor the said Francis Gorman was able to sell or lease said property or to use same for any purpose or derive any income therefrom since the date of the construction of said embankments, whereby plaintiff has been damaged \$3700.

"Plaintiff therefore prays judgment against defendants for the sum of \$7400.

"For a second cause of action plaintiff makes the facts set forth in the first paragraph of her petition a part of the statement of this cause of action and further states that said embankments and said pond constitute continuing nuisances which plaintiff is entitled to have abated and as to which she has no ade-

quate remedy at law, and plaintiff therefore prays that defendants be required to abate said nuisances and that they be enjoined from maintaining said solid embankments without adequate provision for the drainage of water that may come against same, and from maintaining said pond or of draining any filth therein, and plaintiff prays the court to grant her such other and further relief as may be equitable and just."

The demurrer which was sustained is as follows: "Now come the defendants in the above entitled cause and demur to the petition of the plaintiff, and for grounds thereof say that the facts stated in said petition are not sufficient to constitute a cause of action. And for further grounds of demurrer, these defendants say that it appears upon the face of said petition that the embankments, the erection of which is complained of, were built in the year 1893, more than ten years prior to the filing of this suit, and that by reason thereof, under the statutes of the state of Missouri, sections 4262, 4272 and 4273, Revised Statutes 1899, the plaintiff should not be permitted to maintain this action."

The only question here, is whether the trial court erred in sustaining said demurrer.

CAULFIELD, J. (after stating the facts).—As the plaintiff's counsel makes no claim that the petition states a cause of action under the statute (Sec. 3150, R. S. 1909), we will not so consider it, but will treat it, as they treat it, as an attempt to state a cause of action at common law. As to the Statute of Limitations, the rule, as we deduce it from the authorities, is, that where the nuisance is a permanent structure which causes damage and is bound to continue to do so as long as it remains the same, then the entire damage, present and prospective, accrues as soon as such actual damage begins and is discoverable, and is the

subject of a single action, which must be brought within the period of limitation after such accrual. [Bird v. H. & St. J. Ry. Co., 30 Mo. App. 365; Powers v. St. L. I. M. & S. Ry. Co., 158 Mo. 87, 57 S. W. 1090; James v. City of Kansas, 83 Mo. 567; Fowle v. New Haven & Northampton Co., 112 Mass. 334; Town of Troy v. Cheshire R. R. Co., 3 Foster (N. H.) 83; Powers v. The City of Council Bluffs, 45 Iowa, 652; Stodghill v. The C. B. & Q. R. Co., 53 Iowa, 341.] Applying this rule to the facts disclosed by the petition we are of the opinion that the plaintiff's cause of action, if she or her predecessor in title ever had any, for the mere stoppage and overflow or backing up of surface water, is barred by the Statute of Limitations. That particular form of damage was due solely to the erection and maintenance of the embankments without openings, etc. Whether the five or ten-year statute applies, we need not determine, as the time which has elapsed is greater than required by either. Such embankments were so erected in 1893, more than sixteen years before this suit was brought. They were railroad embankments, "solid embankments about fifteen feet high," which are "about as permanent as anything that human hands can make." [Stodghill v. The C. B. & Q. R. Co., supra.] The natural lay and conformation of all the ground in the vicinity was such that the drainage of the surface water was towards the place where the embankments were erected, so that necessarily and immediately they caused such water to back up and overflow the plaintiff's land. From the facts and circumstances stated in the petition it must have been apparent that it would continue to have that effect as long as the embankments remained the same. Plaintiff makes this certain by alleging "*that by reason of the overflow of plaintiff's said property and its liability to be so overflowed as aforesaid neither plaintiff nor the said Francis Gorman was able to sell or lease said property or to use same for any purpose or de*

rive any income therefrom *since the date of the construction of said embankments.*"

With this view of the case it is unnecessary for us to decide whether plaintiff or her predecessor in title ever had any cause of action on account of the turning back upon the plaintiff's land of mere surface water; or whether either of the defendants could be held liable for injury due to an erection made by their predecessor in title, and not by them; or whether the defendant St. Louis and Kansas City Land Company is liable for injuries due solely to an erection not on its land nor under its control.

But we find on perusing the petition the plaintiff does not confine her complaint to injuries due solely to the erection and maintenance of said embankments or to the turning back and overflowing her land with mere surface water. She goes farther, and charges that the waters gathered by the embankment "*stood upon defendants' property and formed a pond thereon into which defendants' drain or permit to drain or flow other waters, slops and filth from a roundhouse, a boarding house and privies in the vicinity; that said pond overflowed defendants' said property and onto plaintiff's said property and at times covers and stands upon the whole thereof, carrying and depositing said filth thereon; that the waters in said pond are and always have been foul and emit foul odors and the deposit of said filth on plaintiff's said property and the said overflow thereof has depreciated the value thereof \$3700.*" What would be the effect if it appeared that this filth came down upon the defendants' land over plaintiff's land, or came upon defendants' land without its active permission we need not determine. The petition states no such case. As we interpret this language the word "permit" is not used in the sense of "passively suffered" but it charges the defendants with affirmative action in permitting other waters, slops and filth to drain into the pond and over-

flow it upon the plaintiff's land, etc. And it charges that both of the defendants are guilty in this respect.

We have no doubt that so considered the petition states a cause of action, and is good against a demurrer, though much of its contents might have been stricken out on motion. While because of the Statute of Limitations already discussed, if for no other reason, the plaintiff cannot now complain that the embankments cause her land to be overflowed by water in its natural volume and state, it is quite clear to us that to the extent plaintiff has been damaged through the pollution and artificial increase of the waters which overflowed her lands, she has a right to recover against the defendants, they having caused or affirmatively permitted such pollution and artificial increase. [Gould on Waters (3 Ed.), sec. 278; Gawtry v. Leland, 31 N. J. Eq. 385; Lockett v. Fort Worth, etc. Ry. Co., 78 Texas, 211, 14 S. W. 564.] This was not the kind of damage which was a natural and necessary consequence of the original erection of the embankments and it could not have been recovered for in a single suit in advance, as could that which we have held is barred. Of course she cannot now recover for any damage, however caused, which has not accrued within five years before this suit was commenced, (Sec. 1889, R. S. 1909). The judgment is reversed and the cause remanded. *Reynolds, P. J., and Nortoni, J., concur.*

**DORA HUCKSTEP, Respondent, v. ST. LOUIS AND
HANNIBAL RAILWAY COMPANY, Appellant.****St. Louis Court of Appeals, July 2, 1912.**

1. **COMMON CARRIERS: Injury to Passenger: Contract Against Liability: Pass.** A contract by a carrier of passengers, relieving it from liability for any consequences of its own negligence, is ineffectual for that purpose, even though the passenger with whom the contract was made was carried on its trains on a free pass.

**Appeal from Pike Circuit Court.—Hon. David H.
Eby, Judge.**

AFFIRMED.

Geo. A. Mahan and J. D. Hostetter for appellant.

A railroad company is not liable for injuries resulting from ordinary negligence to an individual whom it permits to ride without charge on condition that he takes all the risk of such negligence. *Adams v. Railroad*, 192 U. S. 440; *Rogers v. Railroad Co.*, 5 L. R. A. 491; *Quinby v. Railroad*, 5 L. R. A. 846; *Griswold v. Railroad*, 55 Am. Rep. 115; *Kinney v. Railroad*, 3 Am. Rep. 265; *Payne v. Railroad*, 56 L. R. A. 472; *Muldoon v. Railroad*, 22 L. R. A. 794; *Boering v. Railroad Co.*, 193 U. S. 742.

J. B. Jones, W. O. Gray and Elliott W. Major for respondent.

(1) A person riding on a free pass sustains the relation of passenger to the carrier and in an action for personal injuries received in transit by reason of the negligence of the defendant, such person's rights are the same as if such person had paid the usual fare for passage. *Young v. Railroad*, 93 Mo. App. 73; *Buck v. Railroad*, 46 Mo. App. 564; *Wagner v. Railroad*, 97 Mo. 512; *Whitehead v. Railroad*, 99 Mo. 263; *Willmott*

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v. Railroad, 106 Mo. 535. (2) The carrier cannot in this state, by contract or agreement, stipulate against its own negligence, and this rule in its application to carriers of passengers has never been relaxed. *Jones v. Railroad*, 125 Mo. 676; *Tibby v. Railroad*, 82 Mo. 301; *Carroll v. Railroad*, 88 Mo. 239; *Mellor v. Railroad*, 105 Mo. 460; *Bryan v. Railroad*, 32 Mo. App. 228.

CAULFIELD, J.—This is an action by the plaintiff, Mrs. Huckstep, a married woman of the age of thirty-nine years, to recover damages for personal injuries sustained by her while a passenger on one of the defendant's passenger coaches traveling between Bowling Green and Hannibal on the 7th day of September, 1905, by the derailment of a coach, caused by rotten ties, and its overturning and dropping some ten feet down a steep, rocky embankment at a point this side of Frankford. The coach in its fall completely turned "turtle," landing upsidedown in a creek bed, whereby the plaintiff, who weighed one hundred ninety pounds, was greatly and permanently injured, especially in her nervous system. The trial of the case resulted in a verdict for the plaintiff in the sum of \$3000, and judgment being rendered thereon, the defendant has duly prosecuted its appeal to this court.

There is no question raised upon this appeal but that the facts shown in evidence established a prima facie case of negligence, causing plaintiff's injury, against the defendant; nor is any point made as to the giving or refusing of instructions or the admission or exclusion of evidence; but the defendant contends that the trial court erred in striking from its answer a plea to the effect that when plaintiff was injured she was riding on a pass, which contained conditions accepted by the plaintiff whereby she voluntarily assumed all risk of accidents and damages and expressly agreed that the defendant should not be regarded as

a common carrier nor as liable to her for injuries to her person, whether caused by the negligence of the company's agents or otherwise. Defendant's theory in making this contention is that while a common carrier of passengers may not contract against the consequence of its own negligence with a passenger for hire, it may do so with one riding on a free pass. This very contention and theory were carefully and well considered and decided adversely to the defendant by the Kansas City Court of Appeals in the case of *Bryan v. Mo. Pac. Ry. Co.*, 30 Mo. App. 228. We regard that decision as sound and consistent with the general tendency of the decisions in this state, and see no reason for conflicting with it. The point is ruled against the defendant and the judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

COMMERCIAL ELECTRICAL SUPPLY COMPANY, Respondent, v. MISSOURI COMMISSION COMPANY, Appellant.

St. Louis Court of Appeals, July 2, 1912.

1. **BAILMENTS: For Mutual Benefit: Liability of Bailee.** Where a bailment is for mutual benefit, the bailee is bound to exercise only ordinary care to keep the property safely and return it when the time of the bailment has expired, and is not responsible for any injury occurring without his fault; but such liability may be enlarged by special contract, even to the extent of securing the bailor against any loss whatever.
2. ———: ———: ———: **Contract Extending Liability: Rules of Construction.** Bailees are not presumed to have become liable as insurers, and hence a special contract fixing their liability should not be extended beyond its obvious scope.
3. ———: ———: ———: ———: **Contract Construed.** The hirer of a motor, who, by the contract of hiring, agreed to be responsible for any damage thereto, barring ordinary wear and tear, and to return it in as good condition as when received, was

liable for its destruction by fire, in the absence of a showing that the motor itself caused the fire and hence that this was a peril unavoidably incident to its use, since the parties, by excepting damage from ordinary wear and tear, impliedly indicated that the comprehensive language used should be given full effect as to all other contingencies, and the term "damage" was broad enough to include *destruction* by fire.

4. ———: ———: ———: ———: Consideration. The absence of a special consideration for an agreement by a bailee to be responsible for all damages to the property is immaterial, except as bearing upon the question of intent; the bailment itself being a sufficient consideration for such agreement.
5. **CONTRACTS: Rules for Construction.** The rule that all doubts and ambiguities in a contract should be determined against the party preparing it is not very important and should be resorted to only when all other means of construction fail, especially where the other party signed the contract and caused some changes to be made therein.

Appeal from St. Louis City Circuit Court.—*Hon.*
W. B. Homer, Judge.

AFFIRMED.

Judson & Green for appellant.

(1) The contract being upon a printed form prepared by plaintiff, all ambiguities—all doubts—therein must be determined in favor of defendant. *Surety Co. v. Pauley*, 170 U. S. 133; *Dezell v. Casualty Co.*, 176 Mo. 253; *Hurley v. Co.*, 95 Mo. App. 88; *Hoffman v. Indemnity Co.*, 56 Mo. App. 301; *SeEVERS v. Gable*, 27 L. R. A. 735. (2) A bailee of a chattel is not ordinarily responsible for the destruction of a bailed chattel by fire unless he has failed to use ordinary care for its preservation. 3 Am. and Eng. Ency. Law (2 Ed.), pp. 746, 747; Story on Bailments, secs. 408, 410; *McEvers v. Sangamon*, 22 Mo. 187. (3) The particular language in this contract is not sufficient to enlarge or extend the liability of defendant for said motor beyond that of an ordinary bailee at common law. 2 Blackstone's Commentaries, p. 452; *McEvers*

v. Sangamon, 22 Mo. 187; Whitehead v. Vanderbilt, 10 Daly (N. Y.) 214; Coal Co. v. Jones & Adams, 134 Fed. 711; Lake Michigan v. Crosby, 107 Fed. 723; Seevers v. Gable, 27 L. R. A. (Iowa) 733; Young v. Bruce, 5 Lit. (Ky.) 324; Harris v. Nicholas, 5 Munf. 483; Clough v. Meat Co., 112 Mo. App. 177; Link v. Hathaway, 127 S. W. 916. (4) The words, "It is distinctly understood that while the motor is in your possession you are to be responsible for any damage thereto," etc., do not make defendant an insurer of the safety of the motor. They only mean that defendant is responsible for any damage thereto which is caused by its failure to use ordinary care to protect it from injury, just as any other bailee would be, because they were written with reference to the relations which existed between the parties, i. e., those of bailor and bailee. 2 Blackstone, p. 452; McEvers v. Sangamon, 22 Mo. 190; Whitehead v. Vanderbilt, 10 Daly (N. Y.) 214; Coal Co. v. Jones & Adams, 134 Fed. 711; Lake Michigan Co. v. Crosby, 107 Fed. 723; Seevers v. Gable, 27 L. R. A. 734.

Fagin & Kane and Johnson, Houts, Marlatt & Hawes for respondent.

(1) A bailee may, by agreement, enlarge his common law liability so as to become an insurer of the property bailed against any or all perils to which the thing bailed will be exposed. When a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident, because he might have provided against it by his contract. Grady v. Schweinler, 14 L. R. A. (N. S.) 1089; Sturm v. Boker, 150 U. S. 312; Reinstein v. Watts, 84 Me. 139; Story on Bailments (9 Ed.), secs. 35, 36; Schouler's Bailments, secs. 20, 106, 155; Railroad v. Pullman Co., 139 U. S. 79; Peper v. Mfg. Co., 146 Mo. App. 187; Gathwright v. Calloway Co., 10

Mo. 663. (2) The authorities are unanimous in holding that this question is one of interpretation of the particular contract as to when the bailee is liable for accidental destruction of the property. *Link v. Hathaway*, 143 Mo. App. 502; *Jaminet v. Storage Co.*, 109 Mo. App. 257; *McEvers v. Sangamon*, 22 Mo. 187. (3) The words, "it is distinctly understood that while the motor is in your possession you are responsible for any damage thereto, barring ordinary wear and tear," are sufficient to enlarge the bailee's common law liability so as to cover the damage to the motor in the case at bar. *Gathwright v. Calloway Co.*, 10 Mo. 663; *Peper v. Mfg. Co.*, 146 Mo. App. 187; *Drake v. White*, 117 Mass. 10; *Harvey v. Murray*, 136 Mass. 377; *Archer v. Walker*, 38 Ind. 472; *Cash Reg. Co. v. Callias*, 84 N. Y. Supp. 166; *Rapid, etc., Co. v. Mfg. Co.*, 75 N. Y. Supp. 1008, 75 App. Div. 643; *Phillips v. Stevens*, 16 Mass. 238. (4) If the contract had been silent on this point of liability for damage to the bailed goods, the rule cited by appellant might possibly apply. This contract, by its express terms, takes the case out of the ordinary bailment liability. Effect must be given to the clause which fixes a definite responsibility for any damage barring ordinary wear and tear. See cases cited above.

CAULFIELD, J.—The plaintiff hired a piece of machinery, i. e., a motor to the defendant at twenty-five dollars a month. The contract of hiring was contained in a letter addressed by the plaintiff to the defendant and accepted by the latter, and contained provisions as follows: "It is distinctly understood that while the motor is in your possession you (the defendant) are responsible for any damage thereto, barring ordinary wear and tear, and that after you have no further use for same, you will return said motor in as good condition as when received, barring ordinary wear and tear."

While the motor was in the possession of the defendant under said contract, it was destroyed by a fire which occurred on the defendant's premises without negligence on the part of the defendant. The suit is brought for the value of the motor, \$385. The plaintiff had judgment in the trial court and the defendant has appealed. The facts as above stated were agreed upon at the trial and the only question is whether under such facts the judgment in favor of the plaintiff can be sustained.

This being an ordinary bailment for mutual benefit, if there was no special contract enlarging the defendant's risks as bailee, the law bound it to exercise only ordinary care and diligence to keep the property safely and to return it when the time of the hiring had expired. It did not hold the defendant responsible for an injury occurring without its fault. [McEvers v. Steamboat Sangamon, 22 Mo. 187; Grady v. Schweinler, 14 L. R. A. (N. S.) 1089.] But the defendant could, by special contract, enlarge its liability, even to the extent of securing the plaintiff against all loss whatever. The question here is, did the parties intend that the contract before us should have that effect. The particular language in question is: "It is distinctly understood that while the motor is in your possession you are responsible for any damage thereto, barring ordinary wear and tear." Bailees are not to be presumed to have become liable as insurers and we should not expound this language unfavorably to the bailee, beyond its obvious scope. [3 Am. and Eng. Ency. Law (2 Ed.), p. 750.] But this does not mean that we must distort or ignore the language used by the parties; on the contrary it is our duty to give it effect as showing their intention unless there is something in the nature of the subject-matter or otherwise to indicate a different one. If the words used here are given effect as they must be, we are unable to see how defendant can escape liability for damage by

fire to the motor while in its possession, for the contract expressly provided that he shall be responsible for *any damage, barring ordinary wear and tear*. The fact that the parties expressly excepted "ordinary wear and tear" from the damage for which the defendant was to be responsible indicates that they realized that the words "any damage" were broad enough to include every kind of damage, even ordinary wear and tear, unless expressly excepted; for if the words "any damage" had been intended to mean only damage resulting from defendant's negligence, it would have been entirely unnecessary to except ordinary wear and tear, which could not possibly be ascribed to such negligence. And it may be assumed that by recognizing the necessity for the stating of exceptions, and yet stating only one, the parties indicated that the comprehensive language used should otherwise be given its full effect. There is no reason for holding otherwise. As was said in *Rapid Safety Fire Ex. Co. v. Hay-Budden Mfg. Co.*, 75 N. Y. Supp. 1008, a case very much like this: "The contract is not contrary to public policy; it is not even unreasonable or unfair. There are many reasons why the party who had the custody of the bailed goods, and the control of the premises on which they are kept, should be liable for loss in a case where no fault is proved against any one, rather than that such liability should be placed upon the party who had no control of the goods, and does not even have equal advantages for ascertaining all the facts relating to their destruction. At any rate, in this case the minds of the parties specifically met, in a lawful contract, upon the very event that has occurred, viz., the destruction of the property in question, and we see no reason why the agreement should not be enforced."

Precedents are of little value in construing such contracts as this because so much depends upon the

terms of the particular contract in question, the nature of the subject-matter, etc.; but the following are cited in addition to that last above-mentioned, as tending to support our construction of this contract: *Peper v. Brass Mfg. Co.*, 146 Mo. App. 187, 123 S. W. 1012; *Drake v. White*, 117 Mass. 10; *Archer v. Walker*, 38 Ind. 472. The defendant cites us to the following cases as justifying a contrary construction: *McEvers v. Steamboat Sangamon*, 22 Mo. 187; *Whitehead v. Vanderbilt*, 10 Daly (N. Y.) 214; *SeEVERS v. Gabel*, 27 L. R. A. 733 (Iowa); *Young v. Bruces*, 5 Lit. (Ky.) 324; *Harris v. Nicholas*, 5 Munf. 483; *Lake Michigan Car Ferry Transp. Co. v. Crosby*, 107 Fed. Rep. 723; *Clough v. Stillwell Meat Co.*, 112 Mo. App. 177, 190, 86 S. W. 580. These cases, however, in so far as they bear on the question at all, merely declare that a bailee is excused from his special contract to return the bailed property in good condition if the property perishes or is destroyed without his fault. There are different reasons given in these cases, but they all resolve themselves into the one that under the circumstances the parties must have intended that the bailee should be so excused. Thus, it is said that as the contract is to return a particular specific thing, the parties must from the beginning have known that it could not be fulfilled unless when the time arrived for such fulfillment the thing continued to exist, and when entering into the contract must have contemplated such continued existence as the foundation of what was to be done. Therefore such a contract is to be construed as subject to an implied condition that the parties shall be excused in case before breach the contract becomes impossible from the perishing of the thing without the default of the contractor. [*Leake on Contracts* (5 Ed.), p. 494. See, also, *Clough v. Stillwell Meat Co.*, *supra*; *Whitehead v. Vanderbilt*, *supra*.] The last mentioned case also rested on the ground that performance of a contract is excused

where it becomes impossible by the act of God. *McEvers v. Steamboat Sangamon*, *supra*, would seem to turn on the fact that the casualty by which the property was lost was a peril incident to the nature of the property and therefore could not be taken to be insured against by a mere covenant to return in good condition. The court was also influenced in its decision by another part of the contract which threw light on the part in question. This was also one of the grounds for the decision in *Whitehead v. Vanderbilt*, *supra*. In *Seevers v. Gable*, *supra*, it was held that in the absence of a contract the law would imply a promise upon the part of the bailee to return the property at the expiration of the term in as good condition as when received, ordinary wear and tear excepted, and that the bailee's liability was not enlarged by expressing in the contract just what the law would have implied. To the same general effect is *Lake Michigan, etc. Co. v. Crosby*, *supra*. In the said case of *Seevers v. Gable*, *supra*, it is also mentioned that there was no adequate consideration moving to the defendants as insurers of the property; that the use and the rent were equivalent. It also involved the proposition that intervening impossibility to perform releases from the obligation to perform. The opinions in the other cases mentioned do not contain any discussion of principles for our guidance.

Now, it is apparent that none of the foregoing cases is applicable to the case at bar. The obligation here is not merely to "return said motor in as good condition as when received, barring ordinary wear and tear," though that obligation is contained in the contract. Over and above that "it is distinctly understood" that while the motor is in its possession, the bailee is "responsible for any damage thereto barring ordinary wear and tear." Here, there is no implied condition of the continued existence of the property, but there is an express provision as to liability

in the event of its destruction, for "damage" is broad enough to include "destruction." There is no obligation which has become impossible to perform; the thing which has occurred, damage to the property, is the very thing which makes plaintiff's cause of action complete. It is not an obligation which the law would imply; the law would imply responsibility only for damage due to defendant's negligence, while defendant has distinctly agreed to be liable for "any damage" barring only ordinary wear and tear. We take it also that the fire which destroyed this property was not a peril incident to the nature of the property, as was the action of the ice in *McEvers v. Steamboat Sangamon*, *supra*. If the fire had been due to the friction of the motor, or other like cause, unavoidably incident to the use, it might be considered such a peril, but it was not that; it was, according to the agreed facts, merely a fire "which occurred on defendant's premises." As to there being any special consideration for the special contract to be responsible for any damage to the motor, the statement of facts is silent. However, we do not deem that matter material, except as bearing on the question of intent. The bailment transaction itself was a sufficient consideration for such an obligation.

Defendant also cites the case of *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. Rep. 711, but that case can be of no assistance to us here because the court based its construction of the language there employed upon other provisions of the contract; provisions which are absent here. The case of *Link v. Hathway*, 143 Mo. App. 502, 127 S. W. 913, so far as this matter is concerned, turned on a question of fact as to what the agreement was, and not of law, and of course can be of no aid to us in this case. Nor do we believe that cases are in point where property is bailed for hire to a party who is to do something with it for the bailor, like transporting it, and the bailee agrees

to do such thing safely, for there, as suggested by Judge Goode in *Jamiet v. Storage & Moving Co.*, 109 Mo. App. 257, 84 S. W. 128, the agreement may be said to refer to the manner of doing the thing rather than the result, and it may well be said that the bailee performs such a contract when he does it in a manner which ordinarily prudent and careful persons would deem safe, though the bailed property be otherwise lost or destroyed. The obligation of the defendant here referred not to the manner of his using or keeping the motor but to what he would do if it received "any damage." His obligation is absolute and without exception except as to ordinary wear and tear and there is no reasonable excuse for importing any exception into it.

The defendant also suggests that the contract being on a form prepared by the plaintiff, "all ambiguities—all doubts—therein must be determined in favor of defendant." The rule thus sought to be invoked is not very important, and is resorted to only when all other means fail. It is still further weakened in this case by the fact that the defendant signed the agreement also and even caused some changes to be made therein, thereby to a considerable, if not entire, extent becoming privy to the speech of the plaintiff. [Bishop on Contracts, sec. 414.] We do not think there is still such a doubt as to the proper construction of the contract that this rule can be of service here.

The judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

ISABELLA M. LAWLER, Respondent, v. JOHN H. VETTE, Appellant.

St. Louis Court of Appeals, July 2, 1912.

1. **APPELLATE PRACTICE: Reviewing Evidence: Rules of Decision.** The appellate court, on appeal by a defendant from a judgment rendered on a verdict for the plaintiff, will view the evidence in the light most favorable to the plaintiff.
2. **USURY: Right of Recovery: Necessity of Full Payment by Borrower.** In order to entitle a borrower of money to recover usurious interest, under section 7182, Revised Statutes 1909, which prohibits usurious interest, and provides that the taker may be sued for any sums *paid in excess* of the principal and legal interest, there must have been an actual payment of usury, and the fact that the borrower gave his note therefor will not entitle him to recover; and not only must the amount charged as usurious interest, or some part thereof, have been paid, but the amount actually borrowed and lawful interest thereon must also have been paid, before any amount can be recovered as usury.
3. ———: **Remedies of Borrower: Equity: Rescission.** Where a usurer fails to sue on a note representing the usurious part of a transaction, and holds it, claiming a lien therefor on the borrower's property, the borrower may have it canceled or have other equitable relief, upon paying or tendering the principal and lawful interest.
4. **PAYMENT: Time of Payment: Evidence: Presumptions.** When payment is shown to have been made, but there is no evidence of when it was made, it is presumed to have been made on the day the debt was due.
5. **USURY: Payment of Notes: Time of Payment: Evidence.** In commercial transactions, the presumption is, that the usual course of business was followed by the parties thereto; so that where, in an action for usury, the borrower showed that the notes given for the loan, upon which usury was claimed to have been charged, had been paid, but did not show when they were paid, payment on the day the debt was due is presumed.
6. ———: **Right of Recovery: Premature Action.** Where only a portion of the notes representing a sum borrowed and interest thereon had been paid at the beginning of a suit to recover a sum alleged to have been paid as usury, and the balance, amounting to much more than the amount claimed to have been usuriously taken, was not paid until after the suit was brought,

there had been no payment of something in excess of the amount actually borrowed and lawful interest thereon, without which no cause of action accrued, and hence, as plaintiff must recover on a right of action that existed at the time the suit was instituted, his suit was prematurely brought.

7. **ACTIONS: Premature Actions.** The general rule is, that the plaintiff can succeed only when he has a cause of action at the time he commences suit, and if anything is necessary to be done to make his cause of action complete, it must be done before the suit is commenced.
8. **RES ADJUDICATA: Judgments: Premature Action.** The dismissal of a suit on the ground it was brought before a right of action had accrued will not bar another action thereon.
9. **APPELLATE PRACTICE: Trial Practice: Mode of Saving Points: Premature Action.** The point that a suit was prematurely brought may be raised by offering an instruction in the nature of a demurrer to the evidence and excepting to its refusal.

Appeal from St. Louis City Circuit Court.—*Hon.*
James E. Withrow, Judge.

REVERSED AND REMANDED.

Geo. W. Lubke and *Geo. W. Lubke, Jr.* for appellant.

(1) Prior to the amendment of the statute (now section 7182, Revised Statutes 1909), in 1905, usurious interest paid could not be recovered in this state. *Kirkpatrick v. Smith*, 55 Mo. 389; *Murdock v. Lewis*, 26 Mo. App. 234; *Peters v. Lowenstein*, 44 Mo. App. 406; *Ferguson v. Soden*, 111 Mo. 208. At best, prior to the amendment of the statute in 1905, the usurious interest paid might be applied by way of set off to reduce the amount of the principal unpaid. *Hawkins v. Welch*, 8 Mo. 490; R. S. 1909, sec. 7183. (2) The statute provides that "any person who shall violate the foregoing prohibition of this section (forbidding contracts for more than eight per cent interest per annum), shall be subject to be sued for any and all sums of money paid in excess of the principal and legal rate

of interest of any loan by the borrower." R. S. 1909, sec. 7182. The remedy to recover usurious interest paid provided by the statute is exclusive. *Bank v. Haselton*, 155 Mo. 58; *Matthews v. Paine*, 47 Ark. 54. (3) Assuming that the transaction between plaintiff and defendant is usurious, there is no proof that plaintiff paid any usurious interest. At best she gave notes representing such interest. She, therefore, does not bring herself within the statute and cannot maintain this action. *Chaplin v. Currier*, 49 Vt. 48; *Shirley v. Stephenson*, 104 Ky. 518; *Anderson v. Trimble*, 18 Ky. Law Rep. 507; *McDonald v. Smith*, 53 Vt. 33; 39 Cyc. 1034; *Webb on Usury*, sec. 466. The giving of notes, even though they are secured, representing or including the usurious interest is not the "payment" of usurious interest under the statute. *Rushing v. Bivens*, 132 N. C. 273; *Chaplin v. Currier*, 49 Vt. 48; *Shirley v. Stephenson*, 104 Ky. 518. The charging of usurious interest on a running account is not "payment" thereof under the statute. *Davey v. Bank*, 8 S. D. 214. (4) Plaintiff has paid nothing "in excess of the principal and legal rate of interest." Until she does, she does not come within the language of the statute. *Hawkins v. Welch*, 8 Mo. 490; *Kendall v. Davis*, 55 Ark. 318. (5) The evidence discloses only a purchase by defendant of negotiable paper in the usual course of business for less than its face value. The transaction is therefore not usurious. *Sherman v. Blackman*, 24 Ill. 347; *Colebour v. Savings Inst.*, 90 Ill. 152; *Primley v. Shirk*, 60 Ill. App. 312.

L. Frank Ottofy for respondent.

(1) The right to recover back the usury remained in the plaintiff even though she sold the land upon which the deed of trust was given to secure the notes. 29 Am. and Eng. Ency. Law (2 Ed.), p. 547; *Harper v. Bldg. Assn.*, 55 W. Va. 149; *Lee v. Feamster*, 21

W. Va. 114; Mann v. Bank, 104 Ky. 856; Whinery v. Garrett, 71 S. W. (Ky.) 856. (2) In an action to recover the penalty given by the statute against usury, it is not necessary to show that the principal money has been paid. The offense is complete, when any thing is received for the forbearance, over and above the rate of six per cent per year. Seawell v. Shomberger, 2 Murph. (N. C.) 200; Loyd v. Williams, 3 Will. 262; Grow v. Albee, 19 Vt. 542. (3) The fact that the lender takes the obligation of the borrower for the whole amount of an agreed loan bearing legal interest, but retains a portion of such amount, is sufficient in the absence of satisfactory explanation to justify the jury in finding the loan to be usurious. Egbert v. Peters, 35 Minn. 312. (4) Where there is a dispute as to the facts of a transaction alleged to be usurious it is a question of fact for the jury. A mere cloak to cover the usury will not protect the usurer. 39 Cyc., 1057; Kreibohm v. Yancey, 154 Mo. 85; Guarantee Co. v. Baker, 54 Mo. App. 83; State ex rel. v. Bank, 48 Mo. 193; Little v. Pump Co., 122 Mo. 620; Warehouse Co. v. Glasner, 169 Mo. 47. (5) The record shows that at the time of the trial the defendant had received the \$3000 for the loan. There is no evidence in the record to the effect that the entire sum had not been paid him before the institution of this action. Consequently it will be presumed in aid of the verdict that the evidence was sufficient to support it. Thomasson v. Ins. Co., 114 Mo. App. 119. The judgment being for the right party and as there is no error or defect in the proceedings which affects the substantial rights of appellant, the judgment should be affirmed. Cass County v. Ins. Co., 188 Mo. 17; Levels v. Railroad, 196 Mo. 618; Wabash v. Sloop, 200 Mo. 219; Foster v. Railroad, 112 Mo. App. 73. And even though instructions given may not be wholly free from criticism. Peterson v. Transit Co., 199 Mo. 344; State ex rel. v. Stone, 111 Mo. App. 372. And the appellate

court will not reverse if to do so would be to send the case back for a new trial on an amended petition based on the facts already fully disclosed. *Bragg v. Railroad*, 192 Mo. 357.

STATEMENT.—Suit to recover from defendant a sum of money alleged to have been usurious retained by him as compensation for a loan. The plaintiff had verdict and judgment for \$555, being the amount of the usurious interest with interest thereon from the time of the commencement of this suit. The petition alleges, in substance, that on October —, 1907, plaintiff secured a loan of \$3000 from the defendant on certain real estate; though defendant was entitled only to the legal rate of interest thereon, six per cent, he “without her consent, retained as compensation for the loan of said sum, the sum of five hundred dollars (\$500) in violation of the statute in such cases made and provided.” That is, in substance, all the petition alleges or suggests. There is no allegation or suggestion that plaintiff or any one for her repaid any portion of the loan to defendant or actually paid any interest, either lawful or usurious. The case having originated before a justice of the peace, there was no pleading on the part of the defendant. The case was commenced in the justice court on May 24, 1909. It was tried anew in the circuit court before a jury on March 21, 1911.

Viewed in the most favorable light for plaintiff, as we must view it on this appeal, the verdict being in her favor, the evidence tends to prove that in October, 1907, the plaintiff owned a row of flats in the city of St. Louis, which were in charge of Woolley & Fish, her real estate agents. The property was encumbered by a deed of trust for \$12,000 which was being advertised for sale in foreclosure. She authorized Woolley & Fish to make a loan of \$3000 for her. Mr. Woolley saw the defendant, a money lender, and disclosed to

him his desire to make the loan on the property. The defendant went to look at the property and informed Woolley that he would give \$2500 for the plaintiff's notes for \$3000. Woolley then reported to plaintiff what defendant had said and had her execute forty notes for seventy-five dollars each, aggregating \$3000 in amount, and a second deed of trust securing them. At the trial plaintiff offered all of said notes in evidence. The abstract described them as follows: "The one of these first maturing is in words and figures as follows:

"\$75.00. · St. Louis, Mo., September 28, 1907.

"One month after date I promise to pay to the order of Edwin S. Fish seventy-five dollars, for value received, negotiable and payable without defalcation and discount and with interest from date at the rate of six per cent per annum.

·
"ISABELLA M. LAWLER.

"Indorsed: Without recourse on me.

"EDWIN S. FISH.

"The other thirty-nine notes are identical with the one above set out with the exception of the time of maturity, which is respectively two months to forty months after date. All said notes are marked paid."

She testified that when she executed these notes she knew that the money was coming from the defendant. The notes were made payable to Fish, one of her agents, and were indorsed by him without recourse. The notes and deed of trust were delivered to the defendant and he made his check payable to Woolley & Fish for \$2500. The check was cashed and plaintiff received the amount thereof. She testified that she did not know about the charge for the loan until in November when she received a letter from Woolley & Fish stating that they had charged \$600 commission. Both of the agents testified, however, that they had fully advised her in that respect before closing the deal with defendant. The evidence on be-

half of the defendant tended to prove that, in the ordinary course of business, he purchased the notes from Woolley & Fish, believing that they were the owners, and made no loan to the plaintiff and had no dealings with her or with any one acting for her. That the notes had been made out before Woolley & Fish tried to sell them to any one and that they had offered them to several persons before they came to defendant, but no one would take them because of the large first deed of trust. The only evidence, other than the fact that the notes, when introduced in evidence, were marked paid, tending to show payments on the notes, the times of such payments and the person making them, consisted in the following testimony of the plaintiff herself, elicited by counsel for defendant on her cross-examination: "After I got the money I paid seven of the notes of seventy-five dollars each, the first seven, as many as I had to pay until the property was sold. After I paid the first seven notes I sold the property. I paid these seven notes as they became due. None of the notes was past due when I sold the property. I am sure I did not pay more than seven notes. After the seventh note was paid I didn't pay any more, so I have paid only seven notes with the little interest that accrued on each note at six per cent from date until it became due. Since the seventh note was paid and I transferred the property I have paid no notes at all."

At the close of all the evidence the defendant asked and the court refused to give an instruction in the nature of a demurrer to the evidence. The defendant duly excepted to such refusal. Thereupon, at the instance of the plaintiff, the court gave to the jury the following instruction, the defendant duly excepting:

"I. The court instructs the jury that if you find from the evidence that on or about the 8th day of

October, 1907, the plaintiff was the owner of certain property in the city of St. Louis, known as flats numbers 4112 to 4122 inclusive, North Newstead avenue; and if you further find from the evidence that she, at said time, secured a loan for the sum of \$3000 on said property from the defendant; and if you further find that the defendant made a loan on said property on said sum; and if you further find that he retained out of said sum the sum of \$500 as compensation for the loan of said sum, then you will find a verdict for the plaintiff in the sum of \$500, with interest from the 24th day of May, 1909, at the rate of six per cent per annum."

CAULFIELD, J. (after stating the facts).—In order to entitle a borrower to recover usurious interest there must have been an actual payment of the usury. The fact that the borrower gives his note therefor will not entitle him to recover as for usurious interest paid. [29 Am. and Eng. Ency. Law (2 Ed.), p. 546.] A cause of action to recover on the ground of usury does not accrue until the usurious interest is actually paid. [Webb on Usury, sec. 466; *Anderson v. Trimble*, 18 Ky. Law Rep. 507, 37 S. W. 71.] And not only must the amount charged as usurious interest or some portion thereof have actually been paid, but the money actually borrowed with lawful interest must also have been paid before any amount can be recovered as usury. It is only when the total amount actually paid exceeds the principal and lawful interest that anything can be recovered as usury and then only the amount of such excess. If the principal and legal interest remains unpaid no action to recover usury will be entertained. [Tyler on Usury, p. 422; Webb on Usury, sec. 466; *Hawkins v. Welch*, 8 Mo. 490; *Kearney v. First Natl. Bank*, 129 Pa. St. 577; *Chaplin v. Currier*, 49 Vt. 48; *Kendall v. Davis*, 55 Ark. 318, 18 S. W. 185.] In this state it had been held

that the borrower could not recover back usurious interest which had been paid, at all. [Bank v. Haseltine, 155 Mo. 58, 55 S. W. 1015; Ransom v. Hays, Garn., 39 Mo. 445.] At the time the Haseltine case was decided our statutory provisions concerning interest were the same as now, except in the following particular: In 1905, which was after the Haseltine case had been decided, the Legislature amended what was then section 3708 of the Revised Statutes 1899, and is now the first part of section 7182 of the Revised Statutes 1909, by adding thereto the following: "Any person who shall violate the foregoing prohibition of this section shall be subject to be sued, for any and all sums of money paid in excess of the principal and legal rate of interest of any loan, by the borrower, or in case of borrower's death, by the administrator or executor of his estate, and shall be adjudged to pay the costs of suit, including a reasonable attorney's fee to be determined by the court." It is apparent that this added provision, without which our Supreme Court had declared that a borrower could not recover back usurious interest which he had paid, in giving the right to recover back such interest, places the same limitation upon it which is prescribed or stated by the text-books and authorities first above mentioned and which was recognized by our Supreme Court in the early case of Hawkins v. Welch, *supra*, for it permits the usurer to be sued only for "*money paid in excess of the principal and legal rate of interest.*" And this is logical and just, for until a borrower has parted with the money to be paid as usury he still has it and suffers no loss. If he has paid nothing more than the amount actually borrowed with lawful interest, he has paid no usury and has no just ground for complaint. If he is sued he may have credit for it upon his indebtedness (Sec. 7183, R. S. 1909), and if the usurer fails to sue him and holds the notes representing the usurious portions of the transaction claim-

ing a lien therefor on his property, the borrower may have them cancelled or have other equitable relief upon paying or tendering nothing more than the principal and lawful interest.

It is evident from the foregoing statement of the law that plaintiff's petition is framed upon an erroneous theory, for it makes no allegation beyond the fact that the plaintiff secured a loan of \$3000 from the defendant and that defendant "retained as compensation for the loan of said sum, the sum of five hundred dollars (\$500), in violation of the statute in such cases made and provided." There is no allegation or suggestion that plaintiff or any one for her repaid any portion of the loan to the defendant. Indeed it is quite clear that plaintiff's counsel had no such idea in framing the petition. However, if we were concerned merely with the petition—that is, if the evidence had disclosed a case entitling plaintiff to recover and the court had not misdirected the jury as to the law, we might look upon the petition with that charity which the law indulges in favor of proceedings originating before a justice of the peace, and hold it sufficient, at least after verdict. But when the trial court came to instructing the jury as to the law of the case we find that it adopted the same theory upon which plaintiff had framed her petition, for at the instance of the plaintiff it told the jury in effect that all plaintiff need prove in order to recover was that the defendant made her a loan of \$3000 and retained out of the sum loaned \$500 as compensation for the loan. It impliedly eliminated the necessity of a finding that plaintiff had actually made payment as we have discussed, and thereby committed error.

Moreover, the demurrer to the evidence raised another question. While the evidence tends to prove that the notes were *paid*, there is not a *scintilla* of evidence tending to prove *when* they were paid. The rule is, that when payment is shown to have been

made, but there is no evidence of when it was made, it is presumed to have been made on the day the debt was due. [Johnson v. Carpenter, 7 Minn. 176; 9 Ency. of Evid., p. 721; Lawson's Presumptive Evid., p. 104.] This rule comes under the more general one that "in commercial transactions the presumption is that the usual course of business was followed by the parties thereto" (Lawson's Presumptive Evid., p. 82), a rule which frequently has been applied by the courts of this state. Applying this rule, as we must, it appears that when this suit was commenced, May 24, 1909, only eighteen of these notes, representing \$1350 and interest thereon at six per cent had been paid. The balance were not paid until after this suit was brought. As we have already pointed out, until something in excess of the amount actually borrowed, \$2500, with lawful interest, had been paid to the defendant, no cause of action accrued to plaintiff. She stands then in the position of having commenced this suit long before her cause of action accrued. This is fatal to her maintaining this action. The general rule is that a party can only succeed, when he has a cause of action at the date of the commencement of his suit. If there is anything, such as the making of payments, necessary to be done in order to make his cause of action complete, such thing must be done before suit is commenced, for, if it is done afterwards, even before the trial, it is then too late and of no avail so far as the then proceeding is concerned. [McDowell v. Morgan, 33 Mo. 555; Mason v. Barnard, 36 Mo. 384; Turk v. Stahl, 53 Mo. 437, 438; Freimuth v. Rupp, 8 Mo. App. 568; Tobin v. McCann, 17 Mo. App. 481; Duryee v. Turner, 20 Mo. App. 34; Werth v. City of Springfield, 22 Mo. App. 12; Russell v. Englehardt, 24 Mo. App. 36; Brown v. Shock, 27 Mo. App. 351; Jennings v. Zerr, 48 Mo. App. 528; Heard v. Ritchey, 112 Mo. 516, 20 S. W. 799; Payne v. School District, 87 Mo. App. 415.] As was said in one case, "It is elementary law,

that a plaintiff must recover, if at all, on his right of action as it existed at the institution of his suit. One cannot bring another into court and tax him with cost in defending against a non-existent right, upon the ground that a right may be created pending the procedure." [Tobin v. McCann, 17 Mo. App. 481.] Of course if his suit is defeated upon this ground the judgment is not a bar to another action. [Dillinger v. Kelley, 84 Mo. 561.]

And we are of the opinion that the point that the suit was prematurely brought was properly and sufficiently raised and preserved by offering an instruction in the nature of a demurrer to the evidence and excepting to its refusal. In *Freimuth v. Rupp*, supra, only a memorandum opinion was published, but by resorting to the original opinion on file we find that this court held that as the evidence disclosed the fact under discussion here it was error to refuse an instruction in the nature of a demurrer to the evidence. In *Tobin v. McCann*, supra, the court reversed the judgment and dismissed the cause though the point that the suit was prematurely brought does not appear to have been suggested except by the offering of an instruction in the nature of a demurrer to the evidence. *Werth v. City of Springfield*, supra, was tried upon an agreed statement of facts. The judgment was reversed and the cause remanded because the suit was prematurely brought although that fact appears to have been developed only by the evidence and the only errors assigned were the refusal of instructions which were substantially demurrers to the evidence, and the finding of the court against the defendant upon insufficient evidence. In *Duryee v. Turner*, supra, the fact that the suit was prematurely brought was disclosed by the evidence and this court reversed the judgment and dismissed the suit upon the defendant's exception to the judgment for want of evidence to support it,

such exception being saved in a demurrer to the evidence and defendant's motion for a new trial.

For the error aforesaid in giving plaintiff's instruction to the jury, and in refusing defendant's demurrer to the evidence, the judgment is reversed and the cause remanded. *Reynolds, P. J.*, and *Norton, J.*, concur.

ADOLPH J. LANG, Appellant, v. BENJAMIN
FRIEDMAN, Respondent.

St. Louis Court of Appeals, July 2, 1912.

1. **MONEY HAD AND RECEIVED: Necessity of Showing Defendant's Receipt of Money: Principal and Agent.** The agent of a real estate broker, who negotiated, on behalf of his principal, a sale of land, was not liable to the purchaser for a part of the purchase price which the latter paid directly to the broker, in an action for money had and received, although the deed delivered to the purchaser was a forgery, since defendant would be liable in that form of action only in the event he had received the amount sued for, or his principal had received it for him or for their joint benefit.
2. **PRINCIPAL AND AGENT: Money Had and Received: Liability of Agent: Payment to Principal.** The agent of a real estate broker, who negotiated, on behalf of his principal, a sale of land, was not liable to the purchaser, in an action for money had and received, for a part of the purchase price paid to him and by him turned over to his principal without knowledge that the deed delivered to the purchaser by his principal was a forgery, since an agent who receives money for his principal is relieved from liability if he pays over such money to his principal without notice of any claim thereto on the part of the person from whom he received it.
3. **TRIAL PRACTICE: Demurrer to Evidence.** Where the evidence on an issue of fact is substantially conflicting, it should be submitted to the jury.

Appeal from St. Louis City Circuit Court.—*Hon. Charles Claflin Allen*, Judge.

AFFIRMED.

E. P. Johnson for appellant.

(1) The action for money had and received is favored in law, embracing equitable as well as legal doctrines, and lies where the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience he ought to pay over to the plaintiff. *Banking Co. v. Com. Co.*, 195 Mo. 262; *Greenleaf on Evidence*, sec. 117. (2) And the above includes and makes liable for the whole amount every person interested in or who participates in the transaction, or who receives any portion of the money, or for whom any portion of it is received, as by an agent, although the agent embezzles it and never pays it over to his principal. *Trust Co. v. Gleason*, 77 N. Y. 400; *Indem. Co. v. Gleason*, 78 N. Y. 503; *Bank v. Bank*, 32 Hun (N. Y.) 105; *Story v. Robertson*, 98 N. W. Rep. (Neb.) 825; *Clay v. Waters*, 161 Fed Rep. 815. (3) Money stolen, fraudulently obtained or wrongfully converted to another's use may be recovered as money had and received, not only immediately against the tortfeasor, but against any one into whose possession it may be traced, at least until it reaches the hands of a holder for value without notice. *Keener on Quasi-Contracts*, 181, 183. And one of several tortfeasors is liable for at least the amount received by him in an action for money had and received and the transfer of the property received by him in whole or in part cannot reduce the amount of his liability. *Keener on Quasi-Contracts*, 201, 203. And this is true irrespective of the knowledge of the defendant or defendants of the wrong by which it was originally obtained. *Blake v. Bank*, 219 Mo. 644; *Banking Co. v. Com. Co.*, 195 Mo. 262; *Johnson-Brinkman Co. v. Bank*, 116 Mo. 558.

Andrew Johnson for respondent.

(1) In an action for money had and received, the defendant is only liable for money actually received by him and which in equity and good conscience, he ought to pay the plaintiff. *Com. Co. v. Annan*, 81 Mo. App. 572; *Crane v. Murray*, 106 Mo. App. 697; *Bank v. Orthwein*, 160 Mo. App. 369. (2) The agent who receives money for his principal and pays same over to him in good faith before he receives notice not to make such payment, believing him entitled to it, is not liable to the person from whom the money is received. *Leake on Contracts* (5 Ed.), p. 72; *Butler v. Livermore*, 52 Barb. (N. Y.) 570; *Mechem on Agency*, sec. 561; 27 Cyc., 869. (3) The respondent was not agent of plaintiff and would not be liable to him for negligence, and in any event could not be held for damages for negligence in an action for money had and received, and it is clear from the evidence that Friedman did not at any time represent himself as owner of the lots in question, as it is equally clear that Lowenstein knew and understood all the time that Friedman was merely acting as a broker in offering the lots. *Doman v. Pendleton*, 148 Mo. App. 489.

STATEMENT.—The plaintiff, Adolph J. Lang, brought this, an action for money had and received, against Alfred W. Syrett and Benjamin Friedman. Syrett not being found, the petition was dismissed as to him and the plaintiff proceeded against Friedman alone. A trial being had, the jury returned a verdict for the defendant, and judgment being entered thereon the plaintiff has appealed.

It appears from the evidence that Lang and Friedman, the latter a real estate broker, each had desk-room in the office of one Lowenstein, a real estate agent. One day Friedman was met by Syrett, a real estate agent, who asked him if he was open for a bar-

gain. Friedman asked him where it was and Syrett told him. Friedman looked at the property, some vacant lots, and thought they were cheap. Syrett said he would give him fifty dollars for selling them. Going back to the office, Friedman told Lowenstein that he had seen a bargain in property but had all that he, himself, could carry. Lang, who was present, became interested and told Lowenstein to go and look at the lots, saying if they were cheap he, Lang, might buy them. Lowenstein and Friedman then went to look at the lots. At this time Friedman did not know who owned them; neither did he, himself, profess to own them. He merely represented that they had been offered to him, without mentioning by whom. As Lowenstein expressed it in his testimony, "There was no conversation as to whom Friedman was offering the property for. It was offered to Mr. Lang as a proposition that was offered to Friedman and the latter was going to turn it over to Lang, if he wanted to purchase it. Friedman did not represent it as his own property; he was doing business as a real estate agent and helping to negotiate sales of real estate." Having seen the property Lowenstein reported back to Lang that it was indeed a bargain. Lang said he would buy the lots and thereupon appointed Lowenstein as his agent with full power to buy them and attend to all the papers and details, as well as to advance and pay that portion of the purchase price which was to be paid in cash, some \$705. Because of Lowenstein's greater experience, Friedman, too, left the whole matter with him to look after and close the transaction. No earnest money had been exacted in the transaction, but on January 10, 1907, the day before the deal was finally closed, Friedman received a telephone call from the Maplewood Bank, saying it had an order from Syrett for \$250 which it would like to have Friedman see paid when the deal was closed. It promised to mail the order to Friedman. Friedman then went to

Lowenstein and got a check for \$250 on account of the purchase price, the check being made payable to Friedman. Lowenstein's testimony tends to prove that Friedman did not disclose his connection with Syrett until after his check was given, but Friedman testified in regard to obtaining this check: "I think I told Mr. Lowenstein *for what purpose* it was and that it was a courtesy for the bank, *and for whose account*. It has been so long I don't remember what I said to Lowenstein. Of course I mentioned to him it was for \$250. I got an order from the Maplewood Bank, and from whom I got that order." Friedman deposited this check to his own account in bank and on the next day, January 11, 1907, mailed his own check to the Maplewood Bank in payment of Syrett's order. Syrett had gotten a certificate of title from the title investigator and this was brought to Lowenstein at his office. It showed the title to be in one Wildberger and wife, subject to certain deeds of trust, which was according to the previous understanding of the parties. On January 11, 1907, Lowenstein made out a check for \$455 with which to pay the balance of that portion of the purchase price which was to be paid in cash. This check he made out and signed at his office. It was made payable to Syrett. There can be no doubt that at this time Lowenstein fully understood Friedman's connection with Syrett, that is, that Syrett was purporting to represent Wildberger and that Friedman was a subagent for Syrett. Lowenstein then went with Friedman to Syrett's office where the deeds which Lowenstein had prepared were found, apparently duly executed and acknowledged. The persons present at this time were Syrett, Lowenstein and Friedman. Lowenstein compared the deeds with the certificate of title and on his suggestion Syrett inserted mention in them of the deeds of trust. Lowenstein had Syrett endorse the check for \$455 and took it to the bank upon which it was drawn and procured a cashier's check

payable to Syrett. He then went with Friedman back to Syrett's office and the three of them went with the deeds and cashier's check to the title investigator's office, where Syrett left the deeds and Lowenstein left the check with instructions to the title investigator to record it and then further examine the record title and if found satisfactory, that is, in Lang, to deliver the check to Syrett and the deeds to Lowenstein. All this was done and Syrett received and cashed the check and Lowenstein received the deeds after they had been recorded.

Several months afterwards Friedman heard rumors on the street that Syrett was a forger and communicated the rumor to Lowenstein. Lowenstein made an investigation and found that the deeds to Lang were forgeries. Up to this time Friedman was not cognizant and had no reason to believe that the deeds were forgeries or that any fraud was contemplated or committed. He and Lang were equally innocent in that respect. And, of course, Friedman had no notice or idea that the plaintiff had any claim thereto when the money was paid either to Syrett or to the Maplewood Bank. Neither is there any suggestion that Friedman profited or was to profit out of the transaction except for his fifty dollar commission, and that he never received. Over two years after the forgery became known to him, Lang brought this suit. It was shown by the evidence that Lang reimbursed Lowenstein that \$250 he had first paid to Friedman and Friedman had paid over to the Maplewood Bank on Syrett's order, but the court excluded evidence that Lang reimbursed Lowenstein the \$455 which Lowenstein paid directly to Syrett. (It is interesting to note, though it has no apparent bearing on this case, that Lang made the Wildbergers give him \$100 for a quit claim deed to remove the cloud upon their title cast by the forgery.)

At the instance of the plaintiff the court instructed the jury as follows:

"I. The jury are instructed that if they find and believe from the preponderance or greater weight of the evidence that the plaintiff paid to the defendant Friedman, two hundred and fifty dollars as part of the purchase price of the lots mentioned in the evidence and that deeds to said lots were delivered to the plaintiff and thereafter were found to be forged deeds, and if the jury further find from the evidence that said sum of two hundred and fifty dollars was received by the defendant as a principal in the transaction and for his own use, they will find a verdict in favor of the plaintiff for not exceeding the sum of two hundred and fifty dollars with interest at the rate of six per cent per annum from the time you may believe from the evidence the plaintiff made a demand on the said defendant, if you believe from the evidence that such a demand was made; otherwise from the time of the filing of this suit, to-wit, November 18, 1909."

At the instance of the defendant the court instructed the jury as follows:

"The court instructs the jury that if they believe from the evidence in this case that defendant, Benjamin Friedman, acted as agent for A. W. Syrett, in the transaction with plaintiff, regarding the Greenwood lots, and if you further believe from the evidence that this fact was known to plaintiff's agent, Lowenstein, before the transaction was closed, or any money paid on account of same, and if you further believe from the evidence, that defendant paid to R. L. Wilson, cashier of the Bank of Maplewood, upon the order of A. W. Syrett, the sum of \$250 received by defendant from Lowenstein, and that defendant at the time of such payment had no knowledge that the deeds to plaintiff were forged, then your verdict should be for the defendant."

Plaintiff offered, and the court refused to give, four other instructions. Of these, instruction number 4 authorized a verdict for plaintiff if the jury found "that said defendant showed said lots to said Lowenstein and represented them to be the property of Mary Wildberger and John W. Wildberger respectively, and agreed upon a sale of the same to plaintiff through said Lowenstein for the sum of seven hundred dollars, subject to certain deeds of trust; that thereupon said Lowenstein paid by check to said defendant the sum of two hundred and fifty dollars on the purchase price of said lots; that thereafter said defendant exhibited to said Lowenstein the abstract of title and deeds for said lots, read in evidence by plaintiff, and at his request or at his instance said Lowenstein paid by check to one Alfred W. Syrett, for plaintiff, the further sum of four hundred and fifty-five dollars, the balance of the purchase price of said lots and an abstract of title thereof, and received for plaintiff said deeds and abstract of title; that neither of said deeds were signed or acknowledged by either said Mary Wildberger or John W. Wildberger and were forged." Number 5 authorized such verdict if the jury found from the evidence "that defendant Benjamin Friedman aided Alfred W. Syrett in the negotiation" of the sale of the lots to plaintiff; "that an agreement for such sale to plaintiff of said lots was made and that plaintiff through his representative paid the purchase price agreed on for said lots in part by a check drawn in favor of said defendant, Friedman, and in part by a check drawn in favor of said Syrett, and plaintiff, through either said Syrett or defendant, received in consideration therefor deeds to said lots that were forged." Number 6 was a peremptory instruction to find for plaintiff. Number 7 advised the jury "that it is immaterial whether said defendant had any knowledge or notice that the deeds read in evidence by plaintiff were forged, or that defendant did not receive in

person all the money paid as a consideration for said deeds."

CAULFIELD, J. (after stating the facts).—I. It is clear that under the law and the evidence plaintiff had no right to recover from Friedman the \$455 which was not received by Friedman but was paid directly to Syrett by Lang's agent, and as instructions numbered 4, 5 and 7, offered by the plaintiff and refused by the court, proceeded on the theory that he could so recover, the trial court did not err in refusing them. This is not an action for damages against the defendant and cannot be treated as such. It is purely *ex contractu*, assumpsit for money had and received, to maintain which it was necessary for plaintiff to establish that defendant had received his money, or that Syrett had received it as defendant's agent or for their joint benefit. It was not sufficient to show merely that defendant had acquiesced in or requested the payment to be made to Syrett, the plaintiff not being misled into the belief that he was thereby making a payment to defendant. [N. Y. Guar. & Ind. Co. v. Gleason et al., 78 N. Y. 503; 2 Ency. of Pleading & Practice, p. 1021, and cases cited; Keener on Quasi-Contracts, p. 160; see, also, Roemer Com. Co. v. Annan, 81 Mo. App. 572.]

II. The court rightly authorized a verdict for defendant if the jury found that he received the \$250 as the disclosed agent of Syrett, and paid it over on his principal's order before he had knowledge that the deeds to plaintiff were forged. "It is a complete defense to to an action brought against an agent for money, which was voluntarily paid to him *as agent*, that he has paid the money over to his principal without notice of any claim thereto on the part of the plaintiff, from whom he received the money, the reason therefor is that in legal contemplation the payment

was made by the plaintiff to the defendant's principal; and if in addition thereto the money has in fact reached the principal's hands, without notice on the part of the agent that he should not pay the same over, then, since the money has reached the very person to whom the plaintiff intended to pay it, in circumstances implying nothing inequitable on the part of the defendant in paying it over, the plaintiff should assert his claim against the defendant's principal, and not against the defendant." [Keener on Quasi-Contracts, p. 62. See, also, 27 Cyc. 869; Leake on Contracts (5 Ed.), p. 72; Mechem on Agency, sec. 561; Butler v. Livermore, 52 Barb. (N. Y.) 570; Hearsey v. Boyd, 7 Johns. 182; Roemer Com. Co. v. Annan, 81 Mo. App. 572.] Our decision in St. Charles Savings Bank v. Orthwein, 160 Mo. App. 369, 140 S. W. 921, is not to be construed as holding contrary to what is above quoted, for there the alleged agent had notice at the time that it was receiving the money of plaintiff wrongfully. In this case it is uncontroverted that the \$250 was voluntarily paid to Friedman by Lang's agent and that Friedman paid the money over to the Maplewood Bank on an order of Syrett, his principal, without notice of any claim thereto on the part of Lang and without any knowledge of the forgery. The only disputed question was whether Friedman had disclosed his agency and the identity of his principal when he received the \$250 from Lang's agent. This question was submitted to the jury on what we deem substantial evidence and the jury has found the fact for the defendant. In this view of the case there was no error in refusing plaintiff's peremptory instruction.

The judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

BELLE STROTHER, Appellant, v. JOHN McFARLAND, Respondent.

St. Louis Court of Appeals, July 2, 1912.

1. **EVIDENCE: Ownership: General Repute: Hearsay.** In an action for the conversion of a carriage, testimony that, according to general reputation, the carriage belonged to plaintiff's husband, was hearsay, and had no tendency to prove that plaintiff did not own the carriage, and hence it was error to admit it.
2. ———: **Reputation.** In an action against a tax collector for the conversion of plaintiff's property in payment of her husband's taxes, it was error to admit evidence that plaintiff and her husband were reputed to be tax dodgers.
3. **GIFTS: Inter Vivos: Delivery of Possession.** In order to constitute a gift *inter vivos*, delivery of possession is necessary.
4. **HUSBAND AND WIFE: Gifts: Delivery of Possession.** Where, during coverture, the husband purchases an article for his wife and delivery is made at their home, jointly occupied by them, such delivery is one of possession to the wife, sufficient to constitute a valid gift.
5. **INSTRUCTIONS: Not Supported by Evidence: Imputing Bad Faith.** Where, in an action against a tax collector for conversion of a wife's property for her husband's taxes, there was no evidence that the husband was claiming that she was the owner of the property in question or had any motive for so claiming, it was error to instruct that the jury could consider the motive which prompted the husband to claim that the property had been given to plaintiff, and whether the deal was in fact a *bona fide* gift or one merely in name, to prevent the payment of taxes.
6. ———: ———: ———. Instructions suggesting an imputation of bad faith in a party's conduct are always improper unless warranted by the evidence.

Appeal from Dunklin Circuit Court.—*Hon. J. L. Fort,*
Judge.

REVERSED AND REMANDED.

C. G. Shepard for appellant.

(1) The conduct of counsel for defendant was such that this case should be reversed for that reason alone, were there no other error in the case, for it is reversible error for counsel to continue asking prejudicial questions, even though the court sustains an objection thereto and prevent the answer going to the jury. Cases should be tried in court on their merits and not on insinuations, and innuendoes wrongfully injected therein by designing counsel; and where the complaining party has been injured by such conduct the appellate court will reverse a verdict wrrenched from a jury by such methods. *Gore v. Brockman*, Mo. App. 119 S. W. 1082; *State v. Teeter*, 144 S. W. 445; *Chenoweth v. Sutherland*, 124 S. W. 1056. (2) The court committed reversible error in the line of testimony it permitted defendant to introduce over the objections of the plaintiff. *Vermillion v. Parsons*, 107 Mo. App. 192. (3) The husband has the right to give property to his wife, when the gift is not a fraud upon his creditors, and when the gift is once made the title vests in the wife and she is the absolute owner of the property so given, and such property cannot be seized for subsequently accrued debts of the husband. *State ex rel. v. Jones*, 83 Mo. App. 157; *Bettes v. Magoon*, 85 Mo. 586; *McMunnigal v. Aylor*, 204 Mo. 19.

A. L. Oliver and Ward & Collins for respondent.

(1) The trial court did not err in permitting defendant's attorney to ask questions to which objections were sustained. *Bettes v. Magoon*, 85 Mo. 587; 14 Am. & Eng. Ency. Law (2 Ed.), 1050; *Holthaus v. Hornbostle*, 60 Mo. 439. (2) Defendant contends that the statement on the part of J. D. Strothers, after the gift, was incompetent and should not have been admitted. It was competent, because J. D. Strothers was in possession of the carriage. *Vermillion v. Par-*

son, 107 Mo. App. 193. It was competent to show whether or not J. D. Strothers had intended to part with the title to this property. *Thomas v. Thomas*, 107 Mo. 459; *In re Estate of Soulard*, 141 Mo. 642. The requisites of a valid gift *inter vivos* are: (a) The gift must go into immediate and absolute effect. 14 Am. & Eng. Ency. Law (2 Ed.), 1015; *Thomas v. Thomas*, 107 Mo. 459; *Vogel v. Gast*, 20 Mo. App. 104. (b) The gift must be fully executed. 14 Am. & Eng. Ency. Law (2 Ed.), 1015; *In re Estate of Soulard*, 141 Mo. 642. (c) It is essential that the possession be delivered to the donee, either actual, symbolic or constructive. Am. & Eng. Ency. Law 1015; *Vogel v. Gast*, 20 Mo. App. 140; *Nasse v. Thoman*, 39 Mo. App. 178; *Gartside v. Gartside*, 45 Mo. App. 160; *Banking Co. v. Miller*, 190 Mo. 640. Therefore, from the above law, it was clearly competent to show the declarations of the donor, because he was in possession; it shows his intention was not to part with the title; gift not fully executed; and "Subsequent declarations of donor are admissible, not for the purpose of changing the character of the transaction, but of determining what the transaction was." 14 Am. & Eng. Ency. Law 1051.

NORTONI, J.—This is an action in trover as for conversion. The finding and judgment were for defendant and plaintiff prosecutes the appeal.

Defendant is collector of the revenue of Pemiscot county and as such levied upon and sold a carriage as the property of Jefferson D. Strother for taxes owing by him. Plaintiff is the wife of Jefferson D. Strother and prosecutes this suit against the collector as for a conversion of the carriage, which it is said belonged to her, and not to her husband, for the satisfaction of whose taxes it was sold. The evidence for plaintiff tended to prove that she owned a carriage prior to this one and that her husband, who is a mill man, drove the carriage to his sawmill and kept it there un-

til it was practically destroyed. Because of this he promised to buy her a new one. Thereafter he instructed the dealer to furnish Mrs. Strother with such carriage as she might choose and that he would pay for the same to replace her carriage theretofore destroyed. Plaintiff selected the carriage from a catalog exhibited to her by the dealer, and it was ordered for her in accordance with Mr. Strother's instructions. Upon the arrival of the carriage at Caruthersville, where the parties resided, Mr. Strother caused a team of horses to be hitched thereto and the carriage driven and delivered at the residence occupied by himself and wife. Mr. Strother paid for the carriage with his own means, but according to the evidence of both the dealer and Mrs. Strother, the purchase was made for Mrs. Strother. It appears that Mrs. Strother always claimed the carriage and exercised acts of ownership over it for about three years, that is, from the date of its purchase until levied upon and sold by defendant. The evidence tends to prove that when neighbors sought to borrow the carriage, application was made to Mrs. Strother, to that end, and that her husband made no claim thereto.

The issue in the case was as to whether or not plaintiff or her husband owned the carriage, and it was pertaining to this the proof was directed by either party. Concerning the reception of proof with respect to this matter, the record abounds with error, for it seems the court admitted all manner of testimony in aid of defendant. A goodly portion of this testimony was subsequently withdrawn, on plaintiff's motion, by an oral instruction to the jury, but enough remains in the record to justify the reversal of the judgment on that ground alone. For instance, several witnesses were permitted to testify, over the objection and exception of plaintiff's counsel, that according to general reputation the carriage belonged to Jefferson D. Strother, plaintiff's husband. Touching this matter,

one witness said, "When I heard anything said about it, it was generally known as Jeff's black 'Mariar.'" Obviously all of this testimony is incompetent, for none of it was traceable to admissions by plaintiff. It amounted to no more than rumor and hearsay and did not even tend to prove that plaintiff did not own the carriage. Another witness was permitted to testify, over plaintiff's objection and exception, that plaintiff and her husband were reputed to be "tax dodgers, etc.'" It is obvious that this evidence was introduced for no other purpose than to prejudice the jury and confuse the issue, to the end of preventing a fair trial. It was clearly improper. It is true the court thereafter struck out a portion of this evidence, but from reading the record it is entirely clear that all of it was not stricken therefrom. The court's ruling touching this matter is involved in the following words and limited accordingly: "The Court: That part will be stricken from the record in regard to the taxes, that the collector told him about."

It appears that plaintiff owned the residence property and the place where the carriage was kept, but she and her husband occupied the residence together with their family. Plaintiff testified that her husband did not make any "formal presentation" to her of the carriage at the time it was purchased, but merely purchased it for her in lieu of the one which she had theretofore owned and which he had destroyed. As before said, Mr. Strother instructed the dealer to provide Mrs. Strother with such a carriage as she might select and he would pay for the same. Both plaintiff and Mr. Darrow, the dealer, testified expressly that the carriage was purchased for Mrs. Strother. Of course, Strother himself was not a witness because of the inhibition of the statute, his wife being a party to the suit. Darrow, the dealer, says Strother told him he was buying the carriage for his wife and continues, "In fact, he had me take the catalog to his wife

to select it, and I left it there for a day or more." It appears that Mrs. Strother selected the carriage and the purchase was thereafter consummated by Mr. Strother who paid for the same.

On the theory that the subject-matter involved a gift *inter vivos*, which, of course, requires a delivery of possession, there is a considerable contention throughout the case that the gift of the carriage to Mrs. Strother is ineffective because no actual delivery thereof took place. Touching upon this matter, plaintiff requested the court to instruct the jury as follows, but it declined to do so: "The court instructs the jury, that if you believe and find from the evidence that J. D. Strother, the husband of plaintiff, purchased the carriage in question for plaintiff then in contemplation of law the husband never had possession of said carriage, but both the title and possession passes to the plaintiff at the time of the purchase. In such case no delivery, symbolical or actual, is necessary." This instruction is a proper declaration of the law upon the particular facts of the case, and it should have been given. In those cases where, during coverture, the husband purchases an article for the wife and the delivery is made under the purchase at their home, jointly occupied, as here, the law regards such delivery as one of possession to the wife in accordance with the obvious intention of the parties and proceeds as though such possession was never with the husband; for, obviously, in such circumstances, if the husband be regarded as having possession at all, it could have been taken by him only in behalf of his wife. [See authorities in point: *Schooler v. Schooler*, 18 Mo. App. 69, 77; *Wheeler v. Wheeler*, 43 Conn. 503.] By no other instruction given in the case was this question fairly presented to the jury and the court therefore erred in refusing to give the instruction above copied.

Among others, the court gave the following in

struction for defendant: "The court further instructs you that the question for you to determine in this case is whether the carriage in controversy, at the time it was sold by the defendant, was the property of the plaintiff or her husband, Jeff Strother, and in determining that question you are instructed that the burden of proof is upon the plaintiff to show that the property was hers at said time, and you will take into consideration all the facts and circumstances detailed in evidence in this case as who paid for the property, the relation of the plaintiff and Jeff Strother as husband and wife; their acts and conduct concerning the property, the use to which the property was put, together with the motive which prompted said Jeff Strother to claim that said property had been given to plaintiff, whether such deal was in fact a *bona fide* gift or one merely in name to prevent the payment of his taxes and if after a full and fair consideration of all the facts and circumstances in this case you are convinced that said purported gift was made for the purpose of defeating the payment of the taxes of said Jeff Strother, then said purported gift cannot avail in this case and you will find for the defendant." Much of this instruction is well enough, but that portion telling the jury they should consider "the motive which prompted said Jeff Strother to claim that said property had been given to plaintiff, whether such deal was in fact a *bona fide* gift or one merely in name to prevent the payment of taxes, etc," and referring to the gift as a "purported" gift is to be condemned as assuming that Jeff Strother was making some claim that the carriage belonged to his wife and that he had a motive for doing so. Then, too, as to this matter, the instruction is suggestive of bad faith on the part of plaintiff and her husband. There is not a scintilla of evidence in the case that Jefferson Strother, plaintiff's husband, made any claim that the carriage belonged to his wife either at the time or subsequent to

the levy thereon. Indeed, nothing whatever appears as to Jefferson Strother in the case except that he purchased the carriage three years before for his wife, and there is no proof that he had any motive at the time for conferring title upon her except to perform the kindly office of a husband in replacing her prior carriage. The instruction proceeds as though there is some evidence in the case suggesting a motive which prompted Jefferson Strother to claim the carriage had been given to his wife and that this motive was traceable to his non-payment of taxes for which the levy was made. There is no suggestion in the record that Strother was insolvent at the time the carriage was purchased for his wife three years before and that he sought thereby to place it beyond the reach of creditors. When we view all of the facts in evidence, this instruction seems to contain a suggestion of bad faith between plaintiff and her husband in connection with plaintiff's right to the carriage when the evidence reveals none. Instructions suggesting an imputation of bad faith in the conduct of a party are always improper unless warranted by the proof in the case. [See *Beauchamps v. Higgins*, 20 Mo. App. 514; *Sallee v. McMurry*, 113 Mo. App. 253, 270, 88 S. W. 157.]

Because of the errors above pointed out, the judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

DUNNE & GRACE, Respondents, v. ST. LOUIS &
SOUTHWESTERN RAILWAY COMPANY,
Appellant.

St. Louis Court of Appeals, July 2, 1912.

1. **DAMAGES: Loss of Profits: Consequential Damages.** Damages arising from loss of profits from a sale of goods, by reason of delay in their transportation, are consequential damages.
2. **COMMON CARRIERS: Liability for Consequential Damages: Necessity of Notifying Carrier.** A common carrier undertaking to transport goods is not liable for consequential damages arising from loss of profits from the sale of the goods as advertised, by reason of delay in their transportation, where the shipper does not advise the carrier, at the time the contract of carriage is made, of his intention to transport the goods for the purpose of such sale.
3. ———: **Contract for Less than Established Rate: Interstate Commerce.** A shipper is properly required to pay the full freight rate, established under the Interstate Commerce Law (Act February 4, 1887, Chap. 104, 24 Stat. 379; U. S. Comp. St. 1901, p. 3154), although the carrier has, through mistake, contracted to carry at a lower rate.
4. ———: **Overcharge by Connecting Carrier: Liability of Initial Carrier.** Where plaintiff contracted with defendant railroad company for transportation of a car, to be taken over its line to a certain point and there delivered to a connecting carrier to complete the transportation, and, at destination, the connecting carrier, without having advanced to defendant its charges, collected an excessive amount to cover the freight charges of both, asserting, as to the entire sum, the lien of both, defendant, by reason of the wrongful use by the connecting carrier of the agency which defendant gave it by delivery of the shipment to it without requiring an advancement of the then accrued freight, became liable for the excess collected, although it was retained by the connecting carrier.

Appeal from New Madrid Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANDED (*with directions*).

S. H. West, Roy F. Britton and Wammack & Welborn for appellant.

(1) No recovery can be had for damages for purely speculative or contingent damages or for damages which could not have been reasonably anticipated by defendant. *Taylor v. McGuire*, 12 Mo. 313; *Mining Co. v. Clark*, 32 Mo. 309; *Steffen v. Railroad*, 156 Mo. 336; *Connoble v. Clark*, 38 Mo. App. 483; *Rogan v. Railroad*, 51 Mo. App. 665; *Gray v. Railway*, 54 Mo. App. 666. (2) The plaintiffs were bound to pay the regular tariff freight rates, regardless of the rate which was named in the bill of lading. *Railroad v. Hefley*, 158 U. S. 98; *Railroad v. Mugg*, 202 U. S. 242; *Packing Co. v. United States*, 153 Fed. Rep. 1; *Railroad v. Oil Co.*, 204 U. S. 426; *Sutton v. Railroad*, 140 S. W. 76; *Glass Co. v. Railroad*, 136 S. W. 757. (3) The defendant is not liable for any overcharge of freight made by the Illinois Central R. R.

W. A. Anderson for respondent.

NORTON, J.—This is a suit for damages alleged to have accrued on account of defendant's breach of its obligation to transport plaintiffs' goods within a reasonable time and to recover an excessive freight charge wrongfully exacted. Plaintiffs recovered and defendant prosecutes the appeal.

The suit originated before a justice of the peace and found its way by appeal into the circuit court where it was tried without a jury. The complaint sets forth, and the evidence tends to prove, that plaintiffs, copartners, owned and operated a business at Wickliffe, Kentucky, where they retailed wagons, buggies, etc. They had recently purchased a second-hand stock of wagons and buggies and had been closing them out at Paragould, Arkansas, but desired to ship the remnant of such stock from that point to their

store at Wickliffe, Kentucky, for the purpose of making a sale during the session of the circuit court at that place. Plaintiffs applied to defendant's freight agent at Paragould, Arkansas, for a through rate from that point to Wickliffe, Kentucky, for a car of wagons and buggies, and was advised that defendant would transport the same at thirty-five cents per hundred-weight to destination. Upon this representation, plaintiffs made the shipment at the rate mentioned, but it involved the passing of the car over two railroads, as defendant's line did not enter Wickliffe, Kentucky. The contract of shipment contemplated that the car laden with the goods should be transported by defendant to Cairo, Illinois, and there delivered to the Illinois Central Railroad Company, to complete the transportation to Wickliffe. The distance between Paragould, Arkansas, and Wickliffe, Kentucky, via. Cairo, Illinois, is about 110 miles, and the transportation should have been completed within some two or three days. The car was shipped from Paragould on April 8, but was delayed in transit, so that it did not reach Wickliffe, Kentucky until the 19th of that month. As before said, plaintiffs had advertised a sale of wagons and buggies at Wickliffe, Kentucky, during the session of the circuit court, during which, it is said, a considerable number of prospective buyers assemble there. Because of the delay in the transportation, the wagons and buggies did not arrive in time for the sale intended, and plaintiffs therefore lost the profits of the sale, at least for the time being. The loss of the contemplated profits on this proposed sale are the damages sued for as a result of defendant's failure to observe its obligation to transport the goods within a reasonable time. Indeed, Mr. Dunne, one of the plaintiff partners, and the only one who testified, specifically disclaims any damages touching this matter save the loss of profits above mentioned.

The court refused to declare that such damages were too remote and conjectural for recovery on the proof made, and gave judgment for plaintiffs to the contrary. In this, an erroneous conception of the law prevailed, for the evidence is conclusive that plaintiffs did not inform defendant at the time the contract of shipment was entered into, nor at any other time, for that matter, that they were shipping the goods with the purpose of disposing of them at such sale or for any particular purpose whatever. It may be that such contemplated profits were not so remote and conjectural as to render them incapable of ascertainment and recovery had the purpose of the shipment been disclosed when contracted. It is unnecessary to determine this question, for it is not made in the case, as there is naught in the evidence tending to prove that such consequential damages were within the contemplation of the parties at the time the shipment was undertaken. Even if the damages here sued for and recovered are not remote and speculative in the eye of the law in all cases, they are certainly consequential in character. This being true, the rule is well established that a carrier may not be required to respond on the breach of its obligation to transport, within a reasonable time, for such consequential damages, as the loss of profits which depend upon collateral acts or sales, unless he is informed of the shipper's intention to transport the goods for the particular purpose, at the time the contract of shipment is entered into. Unless such purpose is communicated by the shipper to the carrier at the time of entering into the contract, the matter of consequential damages which may arise from the breach is to be regarded as not within the contemplation of the parties and, therefore, not recoverable in any event. Though the rule is that announced in *Hadley v. Baxendale*, touching the breach of a contract, it is said to find appropriate application in those cases where a common carrier is sued for the

breach of its common law obligation to deliver goods within a reasonable time, as will appear by reference to the following authorities: See *Rogan v. Wabash Ry. Co.*, 51 Mo. App. 665; *Steffen v. Mississippi River, etc. R. Co.*, 156 Mo. 322, 336, 56 S. W. 1125; *Gray v. St. L., I. M. & So. Ry. Co.*, 54 Mo. App. 666.

In the complaint plaintiffs lay a claim of eighty dollars for damages on account of delay in the shipment, and by its judgment the court awarded them the full amount claimed on that score. It is entirely clear that such consequential damages may not be recovered on the proof made, and the court erred in giving judgment for plaintiffs thereon.

The other item of damages sued for relates to an alleged overcharge of twenty-two dollars for the freight, and the court gave judgment for plaintiffs for the full amount claimed touching this matter as well. It appears that defendant contracted with plaintiffs to transport the car of wagons and buggies from Paragould, Arkansas, to Wickliffe, Kentucky, via. Cairo, Illinois, over its own line and the Illinois Central at thirty-five cents per hundredweight. At such rate, the total freight justly payable at Wickliffe, Kentucky, was seventy dollars. When the goods arrived at destination, the Illinois Central Railroad Company refused to deliver the same in accordance with the contract and, instead, exacted a payment of ninety-two dollars freight thereon for the through shipment. It appears defendant's agent made a mistake in computing the freight rate and entering into the contract as above mentioned, for no through rate whatever was provided between the point of shipment and destination. The shipment is interstate in character and, of course, falls within the purview of the Interstate Commerce Law. The case concedes that the rate shown in the tariff published and filed with the Interstate Commerce Commission on such shipment was thirty cents per hundredweight from Paragould, Arkansas to

Cairo, Illinois, and ten cents per hundredweight from Cairo, Illinois, over the Illinois Central to Wyckliffe, Kentucky, or a total of forty cents per hundredweight for the through rate. It has been several times decided that such rates duly published and filed with and approved by the Interstate Commerce Commission are conclusive on the parties and not the subject of contract between them. And, indeed, though it appears the carrier has contracted to transport the goods for a lesser rate, through mistake or otherwise, the shipper may be required to pay an additional sum in accordance with the rate duly established under the Interstate Commerce Law before he is entitled to the possession of his goods. One object and purpose of the Interstate Commerce Law is to prevent discriminations and undue preferences, and were the rule of decision otherwise, no doubt many evasions of the act would be accomplished through alleged mistakes in rates. Under any circumstances, the rate of freight on this shipment was not the subject of contract between the parties, and plaintiffs were justly required to pay the full forty cents per hundredweight, or a sum total of eighty-three dollars and twenty cents for the through shipment, notwithstanding the agreement with defendant's freight agent to the contrary. See the following authorities in point: *Sutton v. St. L. & S. F. R. Co.*, 159 Mo. App. 685, 140 S. W. 76; *Gerber v. Wabash R. Co.*, 63 Mo. App. 145; *Texas & Pacific R. Co. v. Mugg*, 202 U. S. 242. It therefore appears that though plaintiffs contracted with defendant for a through shipment at thirty-five cents per hundredweight, or a sum total of seventy dollars, it was entirely proper, in view of the interstate character of the shipment, to require them to pay eighty-three dollars and twenty cents before the goods were delivered at Wickliffe, and in no view of the case may they recover the difference between the seventy dollars, freight contracted, and the eighty-three dollars and twenty

cents, required to be paid because of the law fixing the charge.

But the agent of the Illinois Central Railroad Company at Wickliffe, Kentucky, exacted from plaintiffs ninety-two dollars as a condition to surrendering the goods. From this it appears that plaintiffs were required to pay twenty-two dollars in excess of the contract rate and eight dollars and eighty cents in excess of the rate provided by law. The court awarded plaintiffs a recovery of twenty-two dollars on this item as if the contract touching the same were a valid one and such amount was unlawfully exacted. Obviously this was error under the rule of decision above referred to, but it is not to be doubted that plaintiffs are entitled to recover eight dollars and eighty cents, the amount collected in excess of the tariff rate duly provided. But defendant argues that it may not be required to repay even this sum to plaintiffs for the reason it was unjustly exacted by the Illinois Central Railroad Company and retained by that company. It is said this defendant was wholly unconcerned with such unlawful exaction and has received none of its benefits. We are not impressed with this argument in the least, for whether the Illinois Central retained the excess charged or not, it acted in part as the agent of this defendant in exacting its payment from the plaintiffs. The Illinois Central as connecting carrier had not advanced the accrued freight charges to defendant company, the initial carrier, at the time of this collection and, therefore, was not asserting the right of its lien alone when demand for the same was made. On the contrary, the Illinois Central collected the ninety-two dollars at Wickliffe, Kentucky, in one sum to cover the freight charge for both defendant, the initial carrier, and its own account and, as to the entire sum, asserted the lien of both carriers. In such circumstances, the Illinois Central Railroad Company exercised an agency for defendant, the initial carrier,

in and about collecting the freight, for with defendant's implied consent, it utilized defendant's lien to the end of making such collection. [See Illinois Central R. Co. v. Brookhaven Machine Co., 71 Miss. 663, 673, 674, 675; 2 Hutchinson on Carriers (3 Ed.), sec. 867.] Because of such agency which defendant company authorized by delivering the shipment to the Illinois Central without requiring an advancement of the freight then accrued to it, responsibility is entailed against defendant to the amount of eight dollars and eighty cents for the wrongful conduct of its agent even though the agent retained such excess.

The judgment should, therefore, be reversed and the cause remanded with directions to the circuit court to enter judgment for plaintiffs against defendant for the amount of eight dollars and eighty cents, together with six per cent interest thereon from the date plaintiffs were coerced into pay the same. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

EVA M. RICH, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, July 2, 1912.

1. **INTERSTATE COMMERCE: Who Engaged In: Railroad Switchman: Federal Employers' Liability Act.** A switchman, engaged in switching, in a railroad division yards in this state, a car loaded with freight and in transit from this state to another state, is engaged in interstate commerce, within the Federal Employers' Liability Act (Act Cong. April 22, 1908; Chap. 149, U. S. Stat. at Large, Vol. 35, pp. 65, 66).
2. **DEATH BY WRONGFUL ACT: Death of Railroad Switchman: Interstate Commerce: Federal Employers' Liability Act: Exclusive Remedy.** The Federal Employers' Liability Act (Act Cong. April 22, 1908; Chap. 149, U. S. Stat. at Large, Vol. 35,

pp. 65, 66) supersedes the law of the state in so far as the latter covers the same field, and hence the widow of a railroad employee who was killed while engaged in switching cars containing interstate shipments cannot recover for his death under sections 5425, 5427, Revised Statutes of Missouri of 1909.

3. **FEDERAL QUESTION: Interstate Commerce: Controlling Effect of Federal Decisions: Courts.** A decision of the United States Supreme Court, construing a Federal statute regulating interstate commerce, is controlling on state courts.
4. **DEATH BY WRONGFUL ACT: Death of Railroad Switchman: Interstate Commerce: Federal Employers' Liability Act: Exclusive Remedy.** Where a railroad employee, engaged in interstate commerce, was killed in consequence of a defective car, his widow, though not declaring under the Federal Employers' Liability Act (Act April 22, 1908; Chap. 149, U. S. Stat. at Large, Vol. 35, pp. 65, 66), cannot recover for his death under sections 5425, 5427, Revised Statutes of Missouri of 1909, authorizing an action by a widow for the death of her husband by wrongful act, but a right of action can be maintained only under the Federal act, which requires the personal representative of the decedent to sue for the benefit of the widow and children.

Appeal from Scott Circuit Court.—*Hon. Henry C. Riley, Judge.*

REVERSED AND REMANDED.

W. F. Evans, Moses Whybark and A. P. Stewart
for appellant.

(1) The defense, stricken out by the court, set up a state of facts showing the death of plaintiff's husband occurred while he was in the employ of the defendant, and while the defendant was engaging in commerce between states, and, therefore, her cause of action, if any she has, arose under the laws of the United States, and she could not maintain the suit in her own name, but under the act of Congress the personal representative of her deceased husband must sue. 35 U. S. Statutes at Large, p. 65, sec. 1; *Colasurdo v. Railroad*, 180 Fed. 832; *Zikos v. Railroad*, 179 Fed. 893; *Watson v. Railroad*, 169 Fed. 942; *Johnson*

v. Railroad, 102 C. C. A. 89, 178 Fed. 643. (2) At the time of the accident the car in question was engaged in interstate commerce, and was loaded with interstate commerce, and on its journey, and the federal statute applies to this case. *United States v. Railroad*, 85 C. C. A. 27, 157 Fed. 321; *Railroad v. United States*, 101 C. C. A. 249, 177 Fed. 623; *Railroad v. Voelker*, 65 C. C. A. 226, 129 Fed. 522. (3) The Federal Railroad Employers' Liability Act of April 22, 1908, is exclusive and supersedes all state statutes regulating the relations of railroad employers and employees engaged in interstate commerce. *Fulgham v. Railroad*, 167 Fed. 660.

James A. Finch for respondent.

(1) The next assignment of error is not raised in appellant's original brief, but in a supplemental brief. That is the action of the trial court in sustaining plaintiff's motion to strike out the fourth count of defendant's answer. We submit that the court's action was proper for several reasons: 1st. Because the Federal Employers' Liability Act is unconstitutional, and has so been held by respectable courts. *Hoxie v. Railroad*, 73 Atl. 754; 2nd. Because if said act is constitutional, it does not deprive a party from proceeding under either the state or federal law unless the employee is engaged exclusively in interstate commerce. *Troxell v. Railroad*, 180 Fed. 871. 3rd. The answer did not allege facts sufficient to show that the deceased was engaged in interstate commerce exclusively or even at all. Where the employment is local in character the statute does not apply. *Pederson v. Railroad*, 184 Fed. 737; *Taylor v. Railroad*, 178 Fed. 380. (2) It has been held in states that have enacted safety appliance laws that they are not unconstitutional because Congress has legislated on the same subject. *Railroad v. Ohio*, 91 N. E. 869; *New York v. Railroad*, 91 N. E. 849. An employee engaged

in opening the door for an engine house, turning turntable, etc., has been held to not come within the act. *Malone v. Railroad*, 65 Iowa, 417. And so with a car repairer working on a side track. *Toler v. Railroad*, 64 Iowa, 644. A bridge worker is not within the act. *Johnson v. Railroad*, 43 Minn. 222.

NORTONI, J.—This is a suit for damages alleged to have accrued to plaintiff because of the death of her husband through the wrongful act of defendant. Plaintiff recovered in the amount of \$7000 and defendant prosecutes the appeal.

The suit proceeds under the Missouri statutes which operate the transmission of a cause of action, not exceeding \$10,000, to the wife for the death of her husband, resulting from the wrongful act of another. At the time of his death, September 3, 1909, plaintiff's husband, Andrew J. Rich, was in the employ of defendant as the foreman of a switching crew, engaged in switching cars at Chaffee, Missouri. The switching crew, together with plaintiff's husband, their foreman, was in the act of dis severing a train and placing the several cars thereof on different tracks in defendant's yards. While thus engaged, it became the duty of Rich, the decedent, to go upon the car and set the brake as it moved down an incline on track No. 6. The evidence tends to prove that this car was equipped with a defective grab iron in that it was insecurely fastened to its side. Because of such defective fastening, the grab iron gave way and precipitated Rich upon the railroad track, where he was run upon and killed by the car from which he fell. As before said, plaintiff, wife or widow of the decedent, prosecutes the suit under the provisions of the Missouri statutes (Secs. 5425, 5427, R. S. 1909) for \$10,000 damages alleged to have accrued to her because of the wrongful act of defendant in that it negligently furnished the car with a defective grab iron for her husband to work upon.

Among other matters set forth in the answer, defendant pleaded that plaintiff could not maintain the suit as the widow of Andrew J. Rich, the decedent, but, instead, it should be instituted and prosecuted by the personal representative of Rich, in accordance with the provisions of the Federal Employers' Liability Act. This paragraph of the answer sets forth that defendant is a common carrier by railroad, engaged in commerce between the several states, and avers that plaintiff's husband was in its employ at the time of his death. It avers, too, that plaintiff's husband was then and there engaged in interstate commerce, in that he was engaged in switching and upon and about one of its cars then laden with articles of interstate commerce. It is averred that the car on which was the defective grab iron and which occasioned the death of plaintiff's husband was loaded at Portageville, Missouri, with merchandise destined to Pickneyville and Thebes in the state of Illinois, and that said car was then in transit over defendant's railroad from such point in Missouri to Pickneyville and Thebes in the state of Illinois and as such was employed by defendant as an instrument of interstate commerce; that while said car was thus laden with goods destined from a point in Missouri to the points named in Illinois and being switched in the yards at Chaffee, plaintiff's husband came to his death thereby, while he was engaged in the transportation of interstate commerce in the act of switching the same from one track to another. Because of these facts, defendant denied plaintiff's right to maintain this suit under the statutes of Missouri and averred that, if any cause of action whatever existed against it on account of the death of Rich, it should be prosecuted by his personal representative under the Act of Congress entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April, 22, 1908.

On motion of plaintiff, the court struck out the fourth paragraph of the answer, above epitomized, as though the matter therein set forth was wholly immaterial to the right of the widow to proceed with the suit. There can be no doubt that the court erred in this ruling, for, if the facts thus set forth are true, plaintiff's husband was engaged in interstate commerce at the time of his death. It has been pointedly determined that a car laden with goods and being moved from a point in one state to a point in another is impressed with the character of interstate traffic, which will follow and attend the shipment until the transit ceases, and this, too, notwithstanding the fact that the injury complained of was received in switching such car in the yards of a railroad division, as here. Such is the opinion of the United States Circuit Court of Appeals of this, the Eighth Circuit, as will appear by reference to *Chicago, M. & St. P. Ry. Co. v. Voelker*, 129 Fed. 522. For other authorities reflecting the principle, see *United States v. Colorado & N. W. R. Co.*, 157 Fed. 321 (C. C. A. 8th Circuit); *Norfolk & W. Ry. Co. v. United States*, 177 Fed. 623 (C. C. A. 4th Circuit). That plaintiff's husband was engaged in the transportation of interstate commerce at the time of his death is not to be doubted, for he was then acting in the authority of the master as defendant's servant in switching a car laden with articles of commerce in transit from one state to another.

In the recent case of *Walsh v. New York, New Haven, etc., R. Co.*, 223 U. S. 1, the decedent, a car repairer, in the employ of the railroad company, came to his death while engaged in replacing a drawbar on one of defendant's cars then laden with interstate commerce, as a result of other cars being pushed by fellow-servants of the decedent against the car under repair. On this state of facts, the Supreme Court of the United States declared the decedent was engaged in interstate commerce at the time of his death

and that the cause of action which accrued therefrom was properly prosecuted under the Employers' Liability Act. [See Second Employers' Liability Cases, 223 U. S. 1. As touching upon the same matter, see *Zikos v. Oregon R. & N. Co.*, 179 Fed. 893; *Colasurdo v. Central Railroad of New Jersey*, 180 Fed. 832.] These authorities are conclusive on the question here in judgment, to the effect that plaintiff's husband was engaged in interstate commerce at the time of his injury and death. This being true, the act of Congress, approved April 22, 1908, entitled, "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases" supersedes the law of the state in so far as the latter covers the same field and precludes the right of the widow to recover under our statutes (Secs. 5425, 5427, R. S. 1909).

The portions of that act relevant here are the sections hereinafter copied, for the cause of action accrued September 3, 1909 and prior to the amendment of the act, approved April 5, 1910.

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency,

due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the

person entitled thereto on account of the injury or death for which said action was brought.

"Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Sec. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

"Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled 'An Act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between states and foreign nations to their employees,' approved June eleventh, nineteen hundred and six." (Chap. 149, U. S. Stat. at Large, Vol. 35, pp. 65, 66).

Under this act, the suit is to be prosecuted by the personal representative of Rich for the benefit of the surviving widow and children of such employee and, if none, then of such employee's parents, and, if none, then of the next of kin, dependent upon such employee. In *Northern Pacific Ry. Co., P. E., v. Babcock, D. E.*, 223 U. S. 1, the suit was prosecuted under the Employers' Liability Act by the administrator of the decedent, who came to his death in the state of Montana. By the provisions of the Employers' Liability Act, the recovery by such administrator is available to the widow, while under the statutes of Montana, it should be for the benefit of the widow and his sister jointly. On this state of facts, the question was made: "Do these regulations (i. e., Employers' Liability Act) supersede the laws of the state in so far as

the latter cover the same field?" The Supreme Court answered the question thus made in the affirmative, to the effect that, inasmuch as Congress had acted upon the subject, the provision of the Federal statute was exclusive. Touching this question, the court said: "The third question, whether those regulations supersede the laws of the states in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice MARSHALL in *McCulloch v. Maryland*, 4 Wheat. 316: (p. 405) 'If any one proposition could command the universal assent of mankind, we might expect it would be this, that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it, by saying, 'this Constitution, and the laws of the United States, which shall be made in pursuance thereof, . . . shall be the supreme law of the land,' and by requiring that the members of the state Legislature, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any state, to the contrary notwithstanding.'

"(p. 426) 'This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws

of the respective states, and cannot be controlled by them.

“And particularly opposite is the repetition of that principle in *Smith v. Alabama*, 124 U. S. 465, 473:

“The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several states, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the states. It follows that any legislation of a state, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority.

“True, prior to the present act the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. [*Sherlock v. Alling*, 93 U. S. 99; *Smith v. Alabama*, 124 U. S. 465, 473, 480, 482; *Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 99; *Reid v. Colorado*, 187 U. S. 137, 146.] The inaction of Congress, however, in no wise affected its power over the subject. [*The Lottawanna*, 21 Wall. 558, 581; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215.] And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is. [*Gulf, Colorado & Santa Fe Railway Co. v. Hefley*, 158 U. S. 98, 104; *Southern Railway Co. v. Reid*, 222 U. S. 424; *Northern Pacific Railway Co. v. Washington*, 222 U. S.

370].” [See Second Employers’ Liability Cases, 223 U. S. 1, 53, 54, 55.]

Under the Constitution of the United States, the subject-matter of commerce between the states is one exclusively within the power of Congress and such regulations as it has provided within the limits of the Constitution supersede and displace all state laws concerning rights arising thereabout. The interpretation, construction and effect of Federal Statutes concerning such commerce by the Supreme Court of the United States is conclusive upon all other tribunals when the same matters are called in question. It is, therefore, obvious that, though plaintiff did not declare upon the Employers’ Liability Act, she nevertheless may not maintain this suit under our statute, for the right of recovery is given by the authority of Congress to the personal representative of her husband for the benefit of herself and his children.

The court erred in striking out the portion of the answer above mentioned and in denying defendant the right to show the facts therein set forth. Because of this, the judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

ROBERT BELL, Guardian and Curator for RUBY PEARL BELL, a Minor, Respondent, v. MISSOURI STATE LIFE INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals, July 2, 1912.

1. **LIFE INSURANCE: Delivery of Policy: Validity of Provisions.** A provision in a life insurance policy, that it shall not take effect unless the premium is paid and the policy is delivered to and accepted by the insured during his lifetime and in good health, is valid.

2. ———: ———: ———: **Waiver.** A provision in a life insurance policy, that it shall not take effect unless the premium is paid and the policy is delivered to and accepted by the insured during his lifetime and in good health, being for the benefit of the insurer, may be waived by it or its authorized agent.
3. ———: ———: ———: **Acts Constituting Delivery.** Where insured paid his full first premium on a life insurance policy in advance and directed the soliciting agent to deposit the policy in the agent's safe with insured's other private papers, his act in acquiescing in the policy being deposited in the safe, upon being informed of its receipt by the agent, was a sufficient acceptance of it, under a provision that it should not be effective until delivered to and accepted by the insured while in good health; and this is true although he was not in good health at the time, if the insurer waived so much of the provision as required the delivery to be made while he was in good health.
4. ———: ———: ———: **Waiver by Agent: Ratification.** Where the soliciting agent of a life insurance company, who had authority to collect premiums and deliver policies, collected a premium in advance and transmitted it to the company, and, upon receipt of the policy from the company, delivered it to insured, knowing at the time that he had received injuries two days before, such delivery would be a waiver of a provision in the policy that it should not take effect unless delivered to insured while in good health, if the agent had authority to waive; and although he had no such authority, yet where the company, after receiving proofs of death, showing that insured met with the injury that caused his death before the policy could have been delivered by the agent, delayed several months before offering to return the premium, and during all of such time had knowledge of the fact that insured was not in good health at the time the policy was delivered, it ratified the waiver of the agent.
5. **EVIDENCE: Inferences: Suppressing Evidence: Corporations.** Where the secretary of a corporation against which an action was brought refused, upon advice of counsel, to testify concerning correspondence between him and an agent of the company, touching the subject-matter of the suit, it was proper for the trier of the facts to draw an inference therefrom in aid of the establishment of an issue which it was against the interests of the corporation to establish.
6. **WAIVER: Ratification: May not be Recalled: Life Insurance.** Where a waiver once attaches or a ratification is once had, it can not be recalled by the one making it.

Appeal from Shelby Circuit Court.—*Hon. Nat. M. Shelton*, Judge.

AFFIRMED.

Jones, Jones, Hocker & Davis and Humphrey & Gose for appellant.

Where life insurance policies and applications contain stipulations that the policy shall not take effect unless delivered to the insured while he is in good health, such a stipulation is a condition precedent, and there can be no recovery if the insured is in ill health before the delivery of the policy. Under such circumstances the contract is not consummated. *Misselhorn v. Life Assn.*, 30 Mo. App. 589; *Kilcullen v. Ins. Co.*, 108 Mo. App. 61; *Noyes v. Ins. Co.*, 1 Mo. App. 584; *Kohen v. Life Assn.*, 28 Fed. 705; *Misselhorn v. Life Assn.*, 30 Fed. 545; *Weinfeld v. Life Assn.*, 53 Fed. 208; *Gordon v. Ins. Co.*, 40 Ins. Law Jour. 1838, 80 Atl. Rep. 882; *Hills v. Ins. Co.*, 28 Ky. L. Rep. 790, 90 S. W. 544; *Ins. Co. v. Davis*, 124 S. W. 345; *Neff v. Ins. Co.*, 39 Ind. App. 250, 73 N. E. 1041; *Lee v. Ins. Co.*, 89 N. E. 529, 38 Ins. Law Jour. 1209; *Clark v. Ins. Co.*, 129 Ga. 571; *Powell v. Ins. Co.*, 39 Ins. Law Jour. 1695, 69 S. E. Rep. 12; *McCully v. Ins. Co.*, 18 W. Va. 782; *Ins. Co. v. Kennedy*, 6 Bush 450; *Assur. Soc. v. Elliott*, 29 Ky. L. Rep. 552; *Oliver v. Ins. Co.*, 97 Va. 134; *Girard v. Ins. Co.*, Rep. Jud., Quebec, 20 C. S. 532; *Bacon on Benefit Societies and Life Insurance*, sec. 272; *Richards on Insurance Law* (3 Ed.), sec. 77; *Vance on Insurance* (1904), secs. 62, 67.

V. L. Drain and Jerry M. Jeffries for respondent.

(1) A registration of the policy with the Insurance Commissioner was a delivery thereof. If not, the applicant, having requested the agents to place the policy in their safe for him for safekeeping, a mailing of the same by the company to the agent constituted a delivery thereof. If not, the agent, having re-

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ceived such directions and consenting thereto, received the policy, such constituted a delivery thereof. If not, after such directions to the agent and such receipt by the agent, the agents informing the applicant that the policy had come, constituted a delivery thereof. R. S. 1909, sec. 6910; Gorman v. Stanton, 5 Mo. App. 585; Markey v. Ins. Co., 118 Mass. 178; Assurance Co. v. McArthur, 116 Ala. 659; Kilborn v. Ins. Co., 99 Minn. 178; Bowman v. Accident Co., 124 Mo. App. 477; Dibble v. Assurance Co., 37 N. W. 704; Bishop on Contracts (Enl. Ed.), sec. 350; Cook v. Newbry, 213 Mo. 489. In the absence of known limitations upon the authority of an agent the agent has general authority. Schmidt v. Ins. Co., 2 Mo. App. 339. (2) If the contract was consummated by accepting the risk and issuing the policy or by registering the policy at Jefferson City with the Insurance Commissioner, or by mailing the same to the agents, the judgment is conceded to be right, for it is admitted that on these dates, July 27th, 28th and August 4th, the insured was alive and in good health, also that the first premium was paid to defendant before either of these dates. If the contract required a receipt of the policy by the agents and notice by them to the insured that his application had been accepted and the policy had arrived, the burden is on defendant to show that the applicant was not then alive or was not in good health. It is conceded that he was alive and the question as to applicant's health at that time is one for the jury. A fractured femur or knee joint is not such as was in contemplation of the parties and did not under the business the parties were about, render the contract void because of bad health. Boward v. Bankers Union, 94 Mo. App. 442; Murphy v. Ins. Co., 118 N. W. 355; Higbee v. Ins. Co., 53 N. Y. 603; Grattin v. Ins. Co., 92 N. Y. 274; Cushman v. Ins. Co., 70 N. Y. 72; Peacock v. Ins. Co., 20 N. Y. 293; Ross v. Bradshaw, 1 Wm. Bl. 312; Life Assn. v. Gillispie, 1 Atl.

Rep. 340; *Ins. Co. v. Carder*, 42 U. S. App. 659, 82 Fed. 986. (3) Even though the insured was not in good health at the time of the delivery, the evidence concedes that the agent knew his condition from the day of the injury to the day of his death. This knowledge was the company's knowledge. With full knowledge the company informed the insured that his policy had come and was in their agents' safe for him, just where he had directed them to place it. The company stood by, held the first year's premium, saw the insured die relying upon the same. Such acts estop it from repudiating the agreement it so led the insured to believe existed, though such acts constituted a delivery while the insured was not in "good health." The defendant company, knowing his condition of health at the time of delivery, by delivering the policy and not returning the premium, waived the condition that it shall be void if delivered while the applicant is not in good health. *Hendron v. Triple Alliance*, 45 Mo. App. 426; *Ames v. Ins. Co.*, 40 Tex. 465; *Ins. A. v. Sullivan*, 68 S. W. 695; *Kimbrow v. Ins. Co.*, 108 N. W. 1025; *Berliner v. Ins. Co.*, 121 Cal. 451; *Trust Co. v. Ins. Co.*, 79 Mo. App. 363; *Livermore v. Blood*, 40 Mo. 48; *Baker v. Railroad*, 91 Mo. 152; *Vanschorck v. Ins. Co.*, 68 N. Y. 434; *Stone v. Ins. Co.*, 28 N. W. 47; *Combs v. Ins. Co.*, 43 Mo. 148; *Rush v. Ins. Co.*, 85 Mo. 155; *Horton v. Ins. Co.*, 151 Mo. 617. (4) Even though there was no waiver, and could be none, "of delivery while in good health," by holding to the premium until the insured's death and notifying the applicant that the application had been accepted and that the policy had come for him, defendant company, by sending out blank death proofs, when notified of the death, thereby inducing plaintiff to go to expense and trouble of furnishing the death proofs, estopped itself from denying liability on the contract. *Dolan v. Ins. Co.*, 88 Mo. App. 666; *Okey v. Ins. Co.*, 29 Mo. App. 105; *Meyer v. Casualty Co.*,

123 Mo. App. 682; Francis v. A. O. U. W., 130 S. W. 500; Crenshaw v. Ins. Co., 71 Mo. App. 42. (5) A clause in an application for life insurance or in the policy itself that "the insurance hereby applied for shall not be in effect unless the first premium paid and the policy delivered to and accepted by me while I am alive and in good health" is for the benefit of the company and has no application whatever in those cases where the first annual premium accompanies the application. Such a clause simply gives the company the right to withhold delivery until the premium is paid and to refuse delivery after the policy is issued in those cases where the application is made and accepted and the health of the applicant changes before delivery and before payment of the first premium. Bacon on Benefit Societies and Ins., secs. 272, 273; Young v. Life Assn., 30 Fed. 902; Kelly v. Ins. Co., 3 Mo. App. 554; Ins. Co. v. Stone(42 Mo. App. 383; Ins. Co. v. Whitmore, 9 Ann. Cas. 218; Dobyns v. Ins. Co., 144 Mo. 95; Assn. v. Fintley, 68 S. W. 695; Assn. v. Harris, 57 S. W. 635; Rivara v. Ins. Co., 62 Miss. 720; Grier v. Ins. Co., 132 N. C. 542. (6) By accepting the premium paid for insurance, holding to the same until after death, as in this case until after trial, judgment, appeal and hearing on appeal and at no time offering to return the same to the insured, not offering to return or pay same to the representatives of his estate, defendant is estopped from repudiating the contract when asked to carry out its part of the agreement. It cannot accept the benefits and deny liability on the agreement. The premium should have been returned to the applicant before his death, if not to the administrator of his estate before suit brought, if not paid into court with its answer. None of which were done. R. S. 1909, sec. 6940; Rhodus v. Ins. Co., 137 S. W. 907; Kern v. Legion of Honor, 167 Mo. 487; Jenkins v. Ins. Co., 79 Mo. App. 55; Girard Car Wheel Co., 123 Mo. 372; Retzer v. Packing Co.,

58 Mo. App. 264; Treacy & W. v. Chinn, 79 Mo. App. 648; Ferry Co. v. Railroad, 73 Mo. 389; Implement Co. v. Ellis, 125 Mo. App. 692; Rogers v. Pub. Co., 118 Mo. App. 1; McNealy v. Baldridge, 106 Mo. App. 11; Herzberg v. M. B. A., 110 Mo. App. 328; Larsin v. Ins. Co., 101 Mo. App. 434; Floyd v. Ins. Co., 72 Mo. App. 460; McGrew v. Smith, 136 Mo. App. 343; Andrus v. Ins. Assn., 168 Mo. 165; Wichman v. Ins. Co., 120 Mo. App. 51; Roak v. Deposit Co., 130 Mo. App. 409; Ins. Co. v. Lansing, 20 N. W. 22; Baldwin v. Ins. Co., 55 Mo. 151.

NORTONI, J.—This is a suit on a policy of life insurance. The finding and judgment were for plaintiff and defendant prosecutes the appeal. Plaintiff, a minor, sues by her guardian.

The insured, plaintiff's brother, came to his death at Nogales, Arizona, from an injury received while working as a telegraph lineman. It appears that on July 17, 1909, the insured, Robert William Bell, made a written application to defendant for a policy of life insurance in the amount of \$2000, payable in event of death to his sister, Ruby Pearl Bell. The application was made through defendant's soliciting agents, Cummings & McIntyre, at Nogales, Arizona, to whom the first annual premium of \$103.30 was then in hand paid. The application was forthwith transmitted to defendant by mail and duly received by it at its home office in St. Louis, Missouri, July 23, 1909. Two days after transmitting the application, defendant's agents deducted their commission and forwarded the balance of the first premium to defendant, which it received several days before the policy was issued.

The application for the insurance contained the following stipulation:

"I agree on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application, as follows:

"7. That the insurance hereby applied for shall not take effect unless the premium is paid and the policy delivered to and accepted by me during my lifetime and good health, etc."

On July 27, 1909, the application having been approved and duly accepted, defendant issued the policy here in suit and transmitted it to the State Insurance Department at Jefferson City, Missouri, for registration. After its registration and return to defendant, the policy was mailed by it on August 4, 1909, to Cummings & McIntyre, the soliciting agents at Nogales, Arizona, for delivery to the insured. At the time of making application therefor and paying the premium to defendant's agents, the insured instructed them upon its arrival to deposit the policy for him in their safe along with other private papers of his kept therein.

The insured was employed as a lineman in building and repairing telegraph lines in the vicinity of Nogales, and his duties enforced his absence from that place a considerable portion of the time. It is because of this that the arrangement was made for defendant's agents to receive and deposit the policy for him in their safe with his other private papers. The policy, having been mailed on August 4th by defendant to its agents at Nogales for delivery, was received by them on the morning of August 8, 1909. On August 6th, or two days before the policy was received by Cummings & McIntyre for delivery, a telegraph pole fell upon the insured and inflicted a compound fracture of the thigh. Two or three days thereafter, blood poison resulted from this injury, and the insured died during the night of August 11th.

Defendant's soliciting agent, Cummings, who had taken the application, testifies that he knew of plaintiff's injury on the evening of the day it was sustained—that is, August 6th, and visited the insured in the hospital at Nogales the day following, August 7th.

The same witness testifies that, after the policy arrived, he called upon the insured a second time and informed him that he had received the policy and deposited it in the safe. Though the premium of \$103.30 had been paid by the insured on July 17th, when the application for the insurance was made, and had been duly transmitted to the company a couple of days thereafter, it appears that no tender or offer to repay the same was made to the insured before death by the agent, and defendant still retains it. Neither was there a suggestion by the agent that the policy was to be withheld.

The defense rests entirely upon the stipulation, above set forth and contained in the application, to the effect that the insurance shall not take effect unless the premium is paid and the policy delivered to, and accepted by, the insured during his lifetime and good health. The case was tried before the court without a jury, and the only question for consideration pertains to the sufficiency of the evidence to support the judgment for plaintiff. There can be no doubt that it is competent for the parties to stipulate in the application for insurance, as here, that the policy shall not be effective or binding until delivered to, and accepted by, the insured while in good health and the payment of the first premium is made. It is said that a contract of life insurance is not complete until the last act necessary to be done by the insured, under the conditions of the contract, after acceptance of the application by the company, has been done by him, and the courts, therefore, in proper cases, sustain such agreements which operate to postpone the taking effect of the policy until the delivery and premium payment while the insured is in good health. [See 1 Bacon, Life Insurance (3 Ed.), sec. 272; Kilcullen v. Met. Life Ins. Co., 108 Mo. App. 61, 82 S. W. 966; Misselhorn v. Mut. Reserve, etc., Life Ins. Co., 30 Mo. App. 589; McGregor v. Met. Life Ins. Co., 136 S. W.

(Ky.) 889.] But though such be true, the provision for thus suspending the policy, as an effective contract, until the first premium is paid and its delivery, while the insured is in good health, is for the benefit of the insurer and obviously may be waived by it or by its agent possessing authority with respect to that matter. [See *Rhodus v. Kansas City, etc. Ins. Co.*, 156 Mo. App. 281, 137 S. W. 907.]

Though there were no declarations of law given on behalf of plaintiff indicating the theory on which the recovery was allowed, it is obvious the court proceeded as if defendant had waived its right to insist upon the agreement above set forth. Upon a consideration of the entire record, it is clear the judgment may be sustained on that ground.

When we consider that the insured paid the full premium, cash in advance, and directed the agent to deposit the policy in the safe with other private papers belonging to him (the insured) upon its receipt and that he acquiesced, when informed by the agent the policy had been received and thus deposited, no one can doubt that the court was amply justified in finding the insured accepted the policy. And this is true even though he was not in good health at the time, for, if it appears defendant waived so much of the stipulation as required the delivery of the policy to the insured while in good health, the matter of his acceptance while in good health is thereby eliminated from the case, for, necessarily, delivery on the part of the insurer must precede the acceptance on the part of the insured, and the requirement as to such good health was first waived. Touching the matter of defendant's waiver of the requirement that the policy should be delivered to the insured while in good health before it became effective, the following facts are relevant, and, when considered together with reasonable inferences therefrom, abundantly support the judgment: It appears the premium of \$103.30 had been

paid to the agent, Cummings, in advance, and, less commission, duly transmitted to the company long before the policy was issued. The evidence tends to prove and, indeed, establishes beyond peradventure, that the soliciting agent, Cummings, was authorized by defendant to solicit insurance, accept premiums therefor, and deliver policies to the insured after they were written in the home office of the company. The company accepted the premium paid in this instance, issued the policy in consideration thereof, and transmitted it to the agents, Cummings and McIntyre, for delivery. Though the insured was injured two days before the policy was received at Nogales, and of this the agents were fully advised, for Cummings says he visited him in the hospital on the following day, they nevertheless recorded the policy in the books of their office as a consummated transaction and deposited it in the safe for plaintiff according to his directions. Furthermore, after the policy arrived on the eighth of August, Cummings again visited the insured and informed him that his policy had been received and placed in the safe as directed.

But it is insisted a mere soliciting agent, such as Cummings, is without authority to waive the condition in the policy here relied upon, and, for the purpose of the case, the proposition may be conceded as true. However, the facts last stated make it entirely clear that the agent delivered the policy to the insured with full knowledge of all of the facts pertaining to the condition of his health, and, if it appears that defendant knowingly ratified the agent's act, the judgment may be sustained, for, as before said, it was competent for the company to waive the requirement that the policy should be delivered during the good health of the insured. It appears from the testimony of defendant's secretary that he mailed the policy to Cummings & McIntyre, the agents, on August 4th and on August 15th the company received notice of the

death of the insured and a request for blank proofs of death. The secretary says he mailed such blank proofs forthwith to the agents and the same were executed, returned to the company and received by it on September 15, 1909. The proofs of death thus received by the company on September 15th show clearly that the insured came to his death August 11, 1909, from an injury received on August 6th. From this it was obvious the insured was injured before the policy could have been delivered in due course of mail. In a letter in evidence, signed by defendant's secretary, and dated January 21, 1910, defendant substantially admits it was advised by such proofs of death that the insured was not in good health when the policy was delivered. No one can doubt that on these facts the circuit court was justified in finding defendant was informed on September 15, 1909, from the revelations contained in the proofs of death, that the policy was delivered by its agent to the insured while not in good health.

Furthermore, it appears that though the insured died on the 11th of August, Cummings, the agent, retained the policy in his safe until the following November, when he mailed it to the company at its request. During all of that time, the company retained the premium and, indeed, made no effort to repay it until January 21st of the following year, when its secretary wrote a letter to the father of the insured to the effect that the company would refund the premium if an administrator were appointed to receive it. Just what knowledge the officers of defendant company acquired, during the several months it retained the premium and before offering to return it on January 21, 1910, in addition to that which it had from the proofs of death September 15, 1909, concerning the condition of the insured at the time the policy was deposited in the safe for him by Cummings, does not

appear. But enough is disclosed to show that there was correspondence between the agent, Cummings, and the secretary of the company, touching the matter, even before the policy was returned to the company at its request in November. Under the advice of defendant's counsel, its secretary, a witness, declined to state anything concerning the contents of this correspondence with the agent, Cummings, during the interval. From this conduct of the witness and the fact that defendant requested the return of the policy to it in November, together with the other facts and circumstances above pointed out, it was competent for the court to infer defendant's managing officers possessed full knowledge of all the facts for several months before it offered to return the premium, and thereby ratified the acts of its agent. [See *Kelly v. St. Louis Mut. Life Ins. Co.*, 3 Mo. App. 554.]

In view of the other facts in evidence and the evasive conduct of defendant's secretary, the court was amply justified in holding that defendant, by its managing officers, waived the condition in the insurance contract now relied upon, through retaining the premium with full knowledge of the facts, and that it was not until November, or three months after the death of the insured, and two months after the proofs of death were received, when the policy was returned at its request, that defendant decided upon another course—that is, to contest its payment. It is certain that a waiver once attached, or a ratification once had, may not be recalled by a mere change of opinion about one's rights in the premises. [*Ball v. Royal Ins. Co.*, 129 Mo. App. 34, 107 S. W. 1097.] The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

NELLIE DOLDING, Respondent, v. CITY OF ST.
CHARLES, Appellant.

St. Louis Court of Appeals, July 2, 1912.

1. **MUNICIPAL CORPORATIONS: Injury to Pedestrian: Defective Sidewalk: City's Constructive Knowledge of Defect.** *Held*, that an open and obvious hole in a sidewalk, which had existed for more than a year before it caused an injury to a pedestrian, could have been discovered by the city's officers, by the exercise of due care, in time to have repaired it before the injury was sustained.
2. ———: ———: ———: **Sidewalk Constructed by Property Owner: Liability of City.** The construction of a sidewalk (although of a primitive character) on a public street by abutting property owners, with the consent of the city, constitutes an invitation to the public, on the part of the city, to use the sidewalk, and an assurance that the city will exercise ordinary care to maintain it in a reasonable safe condition, which invitation and assurance continue until it is entirely removed; and hence, in an action for injuries from a defect in such a sidewalk, the direction of a verdict for the city, on the theory that the sidewalk was so defective that the public were not justified in using it, was properly denied.
3. ———: ———: ———: **Contributory Negligence: Question for Jury.** In an action against a city for injuries sustained on a defective sidewalk, where the evidence showed that plaintiff had no knowledge of the defects, that she was injured during the night, and that there were no street lights to aid her observation, the question of her contributory negligence was for the jury.
4. ———: ———: ———: **Instructions.** In an action for injuries caused by a defective sidewalk, the refusal of an instruction that, although private citizens had laid a footway along the street, that did not make it the duty of the city to renew and replace it with another one of like material, when the first became decayed or was worn out; that failure to reconstruct or replace it with another one was not negligence; and that the city performed its full duty by keeping the street in a reasonably safe condition for travel, was not prejudicial error, as the court charged in other instructions that the city performed its full duty by keeping the street in a reasonably safe condition, and there was no claim that the city was required to replace the sidewalk with a new one, but merely a claim that it was its duty to maintain the sidewalk which was there in a reasonably safe condition.

5. **INSTRUCTIONS: Refusal: Abstract Instruction.** It is not error to refuse an instruction which is not applicable to the issues, although it is abstractly correct.
6. ———: ———: **Covered by Other Instructions.** It is not error to refuse an instruction, the subject-matter of which is covered by another instruction which is given.

Appeal from St. Charles Circuit Court.—*Hon. James D. Barnett, Judge.*

AFFIRMED.

Wm. Waye, Jr., and C. W. Wilson for appellant.

(1) The trial court erred in refusing to give the instruction directing a verdict for the defendant. (a) The evidence clearly discloses the fact that the city had been guilty of no negligence or omission of duty. (b) It also clearly and conclusively appeared that any injuries suffered by plaintiff were the result of her own negligence. (2) The court erred in giving plaintiff's instructions numbered 1 and 2. They erroneously direct the jury in substance that it was the duty of the city to maintain artificial sidewalks. (3) The trial court committed reversible error in refusing the instruction asked by the defendant. As an abstract proposition the instruction was correct. (a) The city of St. Charles was under no obligation to construct and maintain artificial sidewalks or footways on the west side of Benton avenue. 1 Dillon on Mun. Corp. (5 Ed.), sec. 242; *Ely v. St. Louis*, 181 Mo. 723; *Ruppenthal v. St. Louis*, 190 Mo. 213. (b) If an artificial sidewalk or footway had been constructed on the west side of Benton avenue, eighteen or twenty years prior to the date of the plaintiff's accident, and had rotted out and gone to decay, the defendant city was under no obligation to replace it with another footway of like material. (c) The city met its whole duty in the premises, if it kept the

street in a reasonably safe condition for people to travel over.

T. C. Bruere, and *A. R. Taylor* for respondent.

Where sidewalks are maintained upon the street, though constructed and maintained by abutting owners with the direct or implied consent of the city, then it becomes the duty of city to keep same in a condition reasonably safe and suitable for the public to travel over. *Benton v. City*, 217 Mo. 708; *Baustian v. Young*, 152 Mo. 325; *Baldwin v. City*, 141 Mo. 212; *Meiners v. City*, 130 Mo. 285; *Haniford v. City*, 103 Mo. 181; *Mans v. City*, 101 Mo. 617.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of personal injuries received through the alleged negligence of defendant. Plaintiff recovered and defendant prosecutes the appeal.

Plaintiff received her injury through stepping into a hole in the sidewalk while walking upon one of the public streets of defendant city. The sidewalk involved was laid along the west side of Benton avenue in the city of St. Charles. It is conceded that Benton avenue was at the time, and had been for as much as thirty years theretofore, a public street of the city. At the time of her injury, plaintiff was walking north along the sidewalk on the west side of Benton avenue between Decatur street and Franklin avenue. While so walking, she stepped into a V-shaped hole, about twelve inches in length and from four to six inches wide at the outer end, and was precipitated forward so that she received a serious and painful injury to her limb. The evidence tends to prove that darkness prevailed and plaintiff was, therefore, unable to discern the defect in the walk. Plaintiff was going to call upon a friend who had but recently moved

into the block, and it appears that she was wholly unfamiliar with the street and the defective sidewalk thereon. That the sidewalk was defective and insecure no one denies; but it is insisted plaintiff ought not to recover for the reason the walk was so defective that it amounted to no sidewalk at all and she should, therefore, have walked upon the ground instead. Though the street was not macadamized, it appears that it was graded and improved by defendant city and had been used by the public for many years as a thoroughfare. Curbs were established along the sides of the street, and west of the west curb, in the usual place for a walk, the sidewalk involved here had been constructed about eighteen years before. This walk was originally constructed by laying upon the earth certain cross beams, and on top of these were made fast two twelve inch planks, side by side lengthwise with the street. It appears the public used this sidewalk for many years in passing to and fro and that it had been permitted to disintegrate until but a portion thereof remained at the place where plaintiff was injured. At some places on the street, the two planks continued as before, while at the place where plaintiff was injured but one plank twelve inches wide remained, and the larger portion of this rested upon the ground. A pathway upon the ground for pedestrians also ran along the side of the walk. Pedestrians sometimes followed the path and at other times walked upon the remaining portion of the walk as did plaintiff.

The evidence tends to prove that at one end of the plank, and immediately where it joined another plank leading forward in the same walk, a V-shaped hole about twelve inches in length existed. It is said that this hole was from four to six inches wide at one place, and that there was a cavity beneath it is obvious, for it appears plaintiff's foot passed through the plank and below. The evidence is overwhelming

that this V-shaped hole had existed in the walk for more than a year before plaintiff's injury and that it was open and obvious in the light of day to one and all. It is clear that by exercising due care defendant's officers would have discovered the defect in time to have repaired it.

It is argued the court should have directed a verdict for defendant on the theory that the evidence reveals no breach of duty on its part, for it is said the law does not devolve upon the city the duty of erecting a new sidewalk. This argument proceeds upon the hypothesis that, though the sidewalk had been constructed by adjacent property owners, with the consent of the city, many years before, it had been allowed to deteriorate and pass out of existence as such. Obviously the argument involves the idea that, because of the defective condition of the walk, an invitation to the public to use it no longer obtained. The question thus made is essentially one for the jury, for the evidence is conclusive to the effect that that portion of the street between the curb and the property line occupied by the walk was not allowed to remain in a state of nature but, instead, was improved by the placing of a sidewalk thereon, and this, too, with the consent and acquiescence of the city. It is true the sidewalk originally consisted of but two heavy planks securely laid side by side upon cross pieces; but, be this as it may, it was a sidewalk of primitive character and as such revealed an invitation on the part of the city to the public to use it in passing to and fro along that side of the street. Having authorized the construction of the sidewalk originally, and thereby extended an implied invitation to the public to use it, no one can doubt that the law cast upon defendant the duty to exercise ordinary care, to the end of maintaining the walk reasonably safe for the use intended. It appears that the public daily used this walk and the single plank therein by which plain

tiff was injured, and from this it is obvious the invitation in that behalf continued to obtain, for, had the city intended to terminate it, the portions of the walk being so used should have been entirely removed by it. No one can doubt that the law devolves upon the city the duty to exercise ordinary care toward keeping its streets and the sidewalks therein in a reasonable state of repair for the use intended. It is certain, too, that, where, by the authority of the city, a street is wrought from a state of nature into an improved thoroughfare and sidewalks laid therein, such act involves an implied invitation to the public to enter upon and pass over the walk there laid. The invitation thus extended involves an assurance on the part of the city that it will exercise ordinary care to maintain the walk reasonably safe for persons who desire to pass over the same, and as long as the sidewalk continues in the street and is susceptible of use as such, the obligation of the city with respect thereto remains intact. Such is the principle reflected throughout all of the well-considered authorities, and the court very properly vindicated it in sending the case to the jury. For a highly intelligent discussion of the principle, see *Benton v. City of St. Louis*, 217 Mo. 687, 118 S. W. 418. For other authorities sustaining the view above stated, see *Baustian v. Young and St. Louis*, 152 Mo. 317, 53 S. W. 921; *Baldwin v. City of Springfield*, 141 Mo. 205, 42 S. W. 717; *Meiners v. City of St. Louis*, 130 Mo. 274, 32 S. W. 637; *Haniford v. Kansas City*, 1103 Mo. 172, 15 S. W. 753; *Maus v. City of Springfield*, 101 Mo. 613, 617, 14 S. W. 630.

The argument that plaintiff should be denied a recovery on the grounds of contributory negligence is wholly without merit. The evidence goes to show that she was without knowledge of the defective condition of the sidewalk and that she was passing over the same under cover of night at a place where there were no street lights to aid observation. In view of these

facts, it will be unnecessary to consider the question of plaintiff's negligence further than to say it was for the jury.

Though plaintiff's instructions are criticized, we see no error therein sufficient to justify a discussion in the opinion. Indeed, they seem to be full, complete and without fault whatever.

Defendant requested and the court refused the following instruction: "The court instructs the jury that although it may be true that on or about the year 1895, private citizens with the permission and consent of the city of St. Charles, did lay a plank or board footway on and along the western side of Benton avenue from Decatur street to Franklin street, that fact did not make it the duty of said city to renew and replace said board or plank footway with another footway of like material when the one placed there by private citizens went to decay or was worn out; that if the board or plank footway placed on the western side of Benton avenue by private citizens, or a part thereof, did in fact decay and wear out, it was not negligence on the part of the city of St. Charles to fail or omit for any length of time, to reconstruct or replace the same with another footway of like material, and said city was under no obligation to construct and maintain artificial sidewalks and footways on the western side of Benton avenue at said time, and said city performed its full duty in the premises if at said place it kept Benton avenue in a reasonably safe condition for public travel by pedestrians." By the instructions given for the city the court presented every theory of its defense from different viewpoints and we see no reversible error in refusing to give the instruction above set forth. There can be no doubt of the abstract proposition contained in this refused instruction that the city was under no obligation to construct "another footway of like material" where the old sidewalk rested. But touching this matter, no

claim whatever was made to the contrary. It was asserted on the part of plaintiff that defendant breached its obligation to exercise ordinary care toward maintaining the sidewalk theretofore laid in a reasonably safe condition, and no one suggested that plaintiff was entitled to recover on the ground that defendant had failed to construct a new sidewalk of "like material," or of any other material, for that matter. Though the refused instruction may be well enough in the abstract, so much of it as pertained to a hypothesis assuming an obligation on the part of the defendant to build a new sidewalk was wholly beside the issue, for no one assumed or asserted such an obligation existed or declared upon a breach to that effect. That portion of the refused instruction which asserts that the city performed its full duty in the premises if it kept Benton avenue in a reasonably safe condition for public travel by pedestrians was given to the jury in numerous other instructions both on the part of plaintiff and on the part of defendant. The case was well instructed on both sides and the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*; and *Caulfield, J.*, concur.

BOARD OF EDUCATION OF THE CITY OF ST.
LOUIS ex rel. JOHNSON HEAT REGULAT-
ING COMPANY, Respondent, v. UNITED
STATES FIDELITY & GUARANTY COM-
PANY, Appellant.

St. Louis Court of Appeals, July 2, 1912.

1. **PRINCIPAL AND SURETY:** Building Contracts: Schools: Subletting Contract: Liability of Surety. A firm of contractors contracted to construct a school building and install a heating system therein, and subsequently the partners transferred their partnership interests to a corporation, in con-

sideration of certain shares of its capital stock issued to them, which corporation, with the acquiescence of all parties, took over the work called for by the contract, and contracted with another company to install the heating system, which, after installation, was accepted by the board of education. *Held*, that the legal effect of the transactions was a subletting of the original contract to the corporation and a subletting by the corporation to the company installing the heating system, and that the latter company was not a mere volunteer, and hence was entitled to maintain an action on the bond, given by the original contractors, as required by section 6761, Revised Statutes 1889, for the unpaid balance due for installing such system.

2. ———: ———: ———: ———: ———. While the liability of a surety on a building contractor's bond extends only to those in privity by contract with the original contract, this privity need not be direct, but may be through a contract with a subcontractor, if the labor and material furnished thereunder fall within the original contract.
3. ———: ———: ———: ———: ———. Where a building contractor, who had contracted to build a school building and install a heating system therein, sublet the contract, and the subcontractor sublet the installation of the heating system, there was a privity of contract between the company installing the heating system and the original contractor, and the sureties on the original contractor's bond were liable for the cost of installing the heating system.
4. **INSTRUCTIONS: Trial Before Court: Function of Instructions.** Where the trial is before the court, declarations of law are only of service as indicating the theory upon which the court tried the case.
5. **PRINCIPAL AND SURETY: Building Contracts: Liability of Surety: Knowledge of Surety.** It is not material to the liability of the surety upon a building contractor's bond, for labor and material furnished under a contract with the subcontractor, whether the surety did or did not know who the subcontractors were to be, at the time of the execution of the bond.
6. ———: ———: **Schools: Instructions.** In an action on a bond given to a board of education by a contractor who had entered into a contract to erect a school building and install a heating system therein, conditioned as required by section 6761, Revised Statutes 1909, for the cost of installing the heating system, under a contract made by plaintiff with the subcontractor, to whom the entire contract was sublet by the original contractor, *held* that a declaration of law given by the court

(the case being tried without a jury), which is epitomized in the opinion, indicates that the court, in making its finding, followed the correct theory of law.

7. ———: ———: ———: **Action on Bond: Parties.** A materialman may maintain an action against the surety in a bond given by a building contractor pursuant to section 6761, Revised Statutes 1899, without making the contractor a party defendant.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Williams*, Judge.

AFFIRMED.

Edw. C. Kehr for appellant.

(1) The question involved in this case was fully considered and determined by this court in *Board of Education ex rel. v. Fidelity & Guaranty Co.*, 155 Mo. App. 109. (2) The distinction sought to be made by the respondent between the former case and this, is not supported by the evidence and is not good in law. It is clear that the relator, the Johnson Heat Regulating Company, is not a subcontractor under Kohlbray and DeLaney, copartners doing business as the National Engineering & Construction Company; and it is equally clear that a surety is bound only for the acts of his principal, and cannot be held for the acts of a volunteer undertaking to carry out the contract of the principal, nor for the acts of the principal's successor in business, if he should undertake to transfer the business. As the evidence in this case establishes beyond cavil that the Johnson Heat Regulating Company is not a subcontractor under Kohlbray and DeLaney, it follows that the plaintiff cannot recover. (3) Where a party becomes a surety for costs in the case of A. v. B., he is not held as surety after C. is substituted as plaintiff in the place of A. Ex parte James, 59 Mo. 280. A surety for one is not, after he takes a partner, liable for their joint debts.

Mallory v. Brent, 75 Mo. App. 473. The contract into which the surety has entered cannot be varied without his consent; and if it is so varied, he will be discharged. Schuster v. Weiss, 114 Mo. 158; Burley v. Hitt, 54 Mo. App. 272; Higgins v. Harvester Co., 181 Mo. 300. It cannot be claimed that when the appellant became surety for Kohlbry and DeLaney, it contemplated that it was also becoming surety for the Advance Engineering & Construction Company, a corporation not then in existence and in no wise connected with the contract between the board of education and Kohlbry and DeLaney. "No one has the right of action on an agreement except those who are in the minds of the parties as the beneficiaries of its provisions." State ex rel. v. Loomis, 88 Mo. App. 506; Howsman v. Water Co., 119 Mo. 304; State v. Railroad, 125 Mo. 617.

S. C. Rogers for respondent.

(1) This case is identical and practically a companion case to that of Board of Education ex rel. v. Fidelity & Guaranty Co., 155 Mo. App. 109. It is also determined by the following cases: Lime & Cement Co. v. Wind, 86 Mo. App. 163; State ex rel. v. Mfg. Co., 149 Mo. 212; Brick & Terra Cotta Co. v. Hull, 49 Mo. App. 433; Board of Education v. Wood, 77 Mo. 197; Devers v. Howard, 144 Mo. 671; Bruce v. Berg, 8 Mo. App. 204; Martin v. Whites & Cox, 128 Mo. App. 125; Forge Co. v. Mfg. Co., 105 Mo. App. 484; Kirkwood v. Byrne, 146 Mo. App. 481; School Dist. v. Beggs, 147 Mo. App. 186; Henry Co. v. Salmon, 201 Mo. 162. (2) Instructions given for relator are correct and even if not, there is no dispute as to facts, the case being merely a question of law and error in instruction is not grounds for a reversal. McQuillin's Instructions to Juries, sec. 8, p. 6; sec. 302, pp. 239-40-41; sec. 304, pp. 241-42-43; Bowman & Co.

v. Lickey, 86 Mo. App. 63. (3) It was not necessary to make Kohlbry & DeLaney and the Advance Company a party to this action, the contract being joint and several. Sec. 2769, R. S. 1909; Manny v. Surety Co., 103 Mo. App. 716.

REYNOLDS, P. J.—We have in this case the same contract and bond which were before us in the case of the Board of Education ex rel. Phillip Carey Co. v. United States Fidelity & Guaranty Co., 155 Mo. App. 109, 134 S. W. 18, hereafter referred to for brevity as the Carey case. In the case at bar, as in the Carey case, a partnership composed of Kohlbry and DeLaney, doing business under the firm name of the National Engineering & Construction Co., and hereafter referred to as the original contractors, entered into a contract with the Board of Education of the city of St. Louis, “to construct, erect and build heating and ventilating plants in the Baden School” in that city. For the performance of that contract the contractors gave a bond to the board of education, the Fidelity & Guaranty Company, appellant here, defendant below, being the surety. The bond and contract were executed March 12, 1907, the bond being given under and in accordance with sections 6761, 6762, Revised Statutes, 1899, that being the law in force at the date of the execution of it and of the contract. Among the other conditions in the bond is the condition that the principals “shall make payment to the parties furnishing the same for all materials used in the work, provided for in the said contract and specifications hereunto annexed, . . . whether by sub-contract or otherwise.” The contract makes the usual provision allowing the board of education to retain from the moneys due and coming to the contractors enough to pay and satisfy the claims of artisans, laborers and all those employed by or furnishing material to the contractors, not however rendering the board of

education liable for the payment of wages and material in case the contractor failed to make payment. As in the Carey case, the condition covered by this provision is not here present. There is also the usual condition authorizing the commissioner of the board to have the work completed on failure of the contractors and to charge the cost therefor against them, the surety of course then being liable.

Shortly after entering into the contract and giving the bond, it appears that the partnership of Kohlbry & DeLaney was dissolved and went out of business, and a corporation called The Advance Engineering & Construction Co., was formed, originally by Kohlbry and two others and into which company DeLaney afterwards entered. Under date of the 18th of March, 1907, the relator here entered into a contract in writing with this Advance Engineering & Construction Co., to place what is called the "Johnson system of temperature regulation" in the Baden school, the installation of this heat regulating apparatus of relator being one of the three systems it was provided in the contract between the original contractors and the school board should be installed. This contract is signed in the name of the Advance Company by Kohlbry as its president. A few months after entering into this contract with the Advance Company, the Johnson Company commenced the installation of these appliances, completing the installation about the 1st of January, 1908. The work of installation of this plant was done under the inspection of the representative of the board of education and was accepted as in all respects satisfactory. The board of education, however, not recognizing the Johnson Heat Regulating Company in the matter, nor anyone but the original contractors, made payments to the original contractors, Kohlbry & DeLaney, under their firm name of National Engineering & Construction Co., the checks by which the payments were made be-

ing indorsed over in the name of the National Engineering & Construction Co., by Kohlbry to the Advance Engineering & Construction Co., and turned over indorsed by Kohlbry as president of the Advance Engineering & Construction Co., to the Johnson Heat Regulating Company. The contract price for the installation of this temperature regulation system was \$1875. The amount paid on account of this contract to the Johnson Heat Regulating Company totalled \$967.46, leaving a balance unpaid of \$907.54. It was for this amount, with interest and costs that this action was instituted in the name of the board of education at the relation and to the use of the Johnson Heat Regulating Company.

So far it will be seen by reference to the Carey case, the bond and the contract and the doing of the work by others than the original contractors, the facts in this case and those in the Carey case are parallel, save as to names and nature of the work. Here the parallel ends. In the Carey case there was no evidence tending to show any privity of contract between the original contractors and the relator there. In the case before us, there are facts in evidence which it is claimed do make the connection.

It appears that at a meeting of the Advance Engineering & Construction Co., held on the 2nd of May, 1907, the following motion was made and carried: "That all the business of the National Engineering & Construction Company be assumed by the Advance Engineering & Construction Company." It further appears that at that time Kohlbry was a stockholder and president of the Advance Company and that DeLaney had become a stockholder in it about that date, and that they had turned over to the Advance Company their interest in their late partnership for stock in that company. There is also evidence tending to show that at least from the time of the making of the contract between the Advance Engineering & Con-

struction Company and the Johnson Heat Regulating Company before referred to, and following that contract, Kohlbry & DeLaney, the original contractors, under their firm name of National Engineering & Construction Company had recognized the Advance Company as having taken over the performance of at least that much of the original contract as covered the installation of the Johnson system in the Baden school. Checks for payments which were made on account of the work were made in the name of the National Company and indorsed in that name by Kohlbry and turned over to the Advance Company and by it to relator. It is also in evidence that the Advance Engineering & Construction Company, shortly after the making of the contract between that company and the Johnson Heat Regulating Company had made an assignment under the statute, it being insolvent. Mr. Kohlbry testified, in substance, that he and DeLaney were in partnership in March, 1907, under the name of National Engineering & Construction Company, under which name they had entered into the contract and given the bond; that the National Engineering & Construction Company, the partnership, was dissolved and all its business assumed by the Advance Engineering & Construction Company, a corporation. He was one of the incorporators and president of the company but did not remember the exact date of incorporation. That company entered into the contract in evidence and before referred to with the relators, he (Kohlbry) signing it as president of the company. Identifying the minute book of the company in which appeared the resolution before set out, and which was read in evidence, he was asked this: "What arrangement, if any, was made between the National Company and the Advance Company with reference to the doing of the heating and ventilating work on the Baden school?" He answered, "Why, the Advance Com-

pany finally assumed the contract of the National Company, as shown by the minutes of the Advance Engineering & Construction Company." Witness did not remember whether the National Company had done any work under the contract or whether the Advance Company did any at all. All that he and his partner DeLaney had by way of money or property was what they had represented in the stock of the Advance Company.

On cross-examination Mr. Kohlbry was asked this: "According to the minute that was read just now, an attempt was made in May, 1907, to turn over to the Advance Engineering & Construction Company the business then on hand of Kohlbry & DeLaney, copartners, doing business as the National Engineering & Construction Company?" He answered, "Yes." The only assets of the partnership were what were subsequently put into the Advance Company. In answer to a question by the court, Kohlbry testified that he and DeLaney had dissolved at the time the Advance Company assumed the partnership business; did not remember that there was any writing outside of the minute read, with reference to the business or mode of business between the National and the Advance Companies.

On this state of facts, the original contract and bond and the contract between the Advance Company and the Johnson Heat Regulating Company being in evidence, the trial court, a jury having been waived, finding the issues for relators, entered up judgment for the penalty of the bond and assessed plaintiff's damage at \$950.29, that being the amount of the debt and interest to the date of the finding. Judgment being entered accordingly, defendant, filing a motion for a new trial, has duly perfected its appeal to this court.

Learned counsel for appellant makes six points as grounds for reversal. First, that the question involved in the case is fully considered and determined

by this court in Board of Education ex rel. Carey v. United States Fidelity & Guaranty Co., supra. Second, that the distinction sought to be made by respondent between that case and this is neither supported by the evidence nor good in law, it being claimed that the relator is not a subcontractor under Kohlbry & DeLaney and that it is clear that the surety is bound only for the acts of his principal and cannot be held for the acts of a volunteer undertaking to carry out the contract of the principal nor for the acts of the principal's successor in business if it should undertake to transfer the business. Third, that the evidence in the case establishes beyond cavil that the Johnson Heat Regulating Company is not a subcontractor under Kohlbry & DeLaney and therefore it cannot recover. Fourth, that the instruction given for plaintiff is erroneous because the facts therein hypothetically assumed are not based on the evidence in the case but are disproved by it; that the conclusion drawn in the instruction is based on three different and inconsistent hypotheses and that it is impossible to tell upon which of them the conclusion announced is founded, and that as the declarations of law asked by defendant announce correct principles of law they should have been given. The fifth proposition is subdivided into four: (a) Where a party becomes a surety for costs in the case of A against B he cannot be held as surety after C has been substituted as plaintiff in place of A. (b) Nor is a surety for one after that one takes a partner liable for the joint debt. (c) The contract into which the surety has entered cannot be varied without its consent and if varied the surety is discharged. (d) It cannot be claimed that when appellant became surety for Kohlbry & DeLaney it contemplated that it was also becoming surety for the Advance Engineering & Construction Company, a company not then in existence and in no-wise connected with the contract and the board of

education and Kohlbry & DeLaney. The sixth point is that in a mechanic's lien suit the contractor is a necessary party defendant against whom the debt must be established; that the bond required by the statute "is a substitute for the lienable real estate of the private owner," and that if the analogy between actions on these bonds and the mechanic's lien law is to be preserved, then the debtor in the suit on the bond is a necessary party, and the debtor not having been made a defendant in this case, the debt could not be established.

Considering the first three points together, we are of the opinion that the crucial fact which was absent in the Carey case and upon the absence of which the decision in that case turned is present in the case at bar. That the Johnson Heat Regulating Company was, in law and in fact, a subcontractor under the Advance Engineering & Construction Company is clear beyond all doubt. The relator was not a volunteer as to that company; it undertook the work by express written contract with the Advance Company.

Was the Advance Company a subcontractor under Kohlbry & DeLaney, the original contractors? We have concluded that there is evidence tending to support the finding of the trial court, that in fact and in law the Advance Company was a subcontractor under the original contract. It took over the work under and by contract with Kohlbry & DeLaney. It is true that no formal subletting appears, but all of its acts and of the board of education support the idea of a subletting and not an assignment of the contract. The board of education recognized no assignment of the contract, as it was necessary for it to do in writing by the terms of the contract, but made all the payments direct to the National Engineering & Construction Company. It is true that the resolution of the Advance Company by which that company took over the business of Kohlbry & DeLaney, was adopted by

the directors of the Advance Company after the execution of the contract between the Advance Company and the Johnson Heat Regulating Company. If not the original agreement, it surely was a ratification of an existing agreement. So that it is clear that the Advance Company did take over at least this part of the contract. All parties, that is Kohlbry & DeLaney, the Advance Company, the Johnson Company, and the board of education recognize that as a fact. Under what form it did so is not material. We may grant that no formal subletting had been made, still there is testimony tending to show that in point of fact the whole contract was sublet by the original contractor to the Advance Company and that the contract for the installation of the heat regulating plant had been sublet by the Advance Company to the relator. No one undertook to make a new contract between the board of education and the Advance Company, or the board of education and relator. All parties acted under the original contract. The acts of the parties establish this as we think beyond controversy. So, to repeat, as between the relator and the Advance Company, the contractual relation is established beyond controversy; as between the Advance Company and the original contractor, there was evidence warranting the trial court in finding that there was privity of contract between Kohlbry & DeLaney, the original contractors, and the Advance Company. Treating the resolution of the Advance Company as intended to place that of record which before existed in parol, or as ratification of what had previously occurred, in either case its legal effect is an acceptance of the obligation of the contract of the original contractors by the Advance Company, evidently done, not as a mere volunteer, but for value, namely, stock in the Advance Company, and on procurement of the original contractors. It was acquiesced in by them, acted on by all parties, and in legal effect is a subletting of the

contract by Kohlbry & DeLaney to the Advance Company, which latter company, in unmistakable terms subsequently sublet this heat regulating part of the contract to the relator.

It is beyond question that the surety of a contractor is only liable to those who have done work or furnished material, by contract, under the original contract; that the liability of the surety extends only to those in privity by contract with the original contractor. While the privity of contract is necessary it need not be directly with the original contract but it must spring out of it. That it is not derived directly from the original contractor does not destroy the privity. It may come through contract with the subcontractor, as, in mechanic's lien cases it frequently does. The contract and the bond require the principal and surety to respond for claims for labor and material furnished under the contract, and whether that claim for labor and material comes directly from the original contractor or from a subcontractor, or from a laborer or materialman under the subcontractor, is immaterial, so long as its origin is called for in the original contract and grows out of the original contract. Those are in privity of contract with the original contractor who do labor and furnish material for the subcontractor under the original contract, provided that labor and material fall within the original contract. As was said by Judge BLAND, speaking for our court in *Hydraulic Press Brick Co. v. School District et al.*, 79 Mo. App. 665, and referring to a bond claimed to have been given under this same provision of the statute, "the evident purpose of the act is to give a right of action on the bond of the contractor to every person who would have a right to file or enforce a mechanic's lien on the building contracted for, only for the fact that buildings of the corporations named in the act are exempt from operation of the mechanic's lien law." We

think it is beyond question in the case at bar that if the school building in which this plant was installed had been subject to the operation and provisions of the mechanic's lien law, there would be no doubt but that the claim of these relators is a claim of such character as is capable of enforcement under that law. Following that law, and by analogy, we think it clear that the claim of the relator is within the letter and the spirit of the bond which was given by the contractors and on which the defendant is surety. Learned counsel for appellant quotes this sentence from page 117 of the Carey case, *supra*: "It is entirely clear that the defendant surety company obligated itself to answer only for the obligation of the copartnership of Kohlbray & DeLaney, the contractors." But following this quotation of part of a sentence from the Carey case is this very significant observation by Judge NORTON, who wrote the opinion: "How or under what inducement the Advance Engineering & Construction Company came to perform the work, which was contracted for by Kohlbray & DeLaney, and engaged relator to aid it in so doing, we are not advised, and the argument advanced concedes that the proof does not show such inducement." That was the fatal defect in the Carey case. Here in the case at bar there was substantial evidence justifying the finding of the trial court that that connection had been made. This, as we think, disposes of the three first points made by the learned counsel for appellant.

The fourth point going to what is claimed to be error in the declarations of law given, is to be considered under the proposition that where the trial is before the court, declarations of law are only of service in indicating the theory upon which the court tried the case. We cannot agree with the contention of the learned counsel for appellant, that the facts in that instruction hypothetically assumed are not based on the evidence in the case and we do not agree that

the evidence disproved them. Nor are we of the opinion that the conclusion drawn in the declaration is based upon three different and inconsistent hypotheses and that it is impossible to tell upon which of them the conclusion announced is founded. That declaration, in substance, sets out that if the court sitting as a jury believes and finds from the evidence that on or about the 12th of March, 1907, the board of education entered into a contract with Kohlbry & DeLaney, copartners, to construct and build the heating and ventilating in the school house, a public school building, and that it was provided in that contract that the contractors, at their own cost and expense, should furnish all the material used in the construction of the work and that about that date Kohlbry & DeLaney, as principals, and the United States Fidelity & Guaranty Company as surety, executed a bond to the Board of Education which was accepted by that board and that the bond provided that if the National Engineering & Construction Company faithfully and properly performed the contract according to the terms thereof and made payment to all the parties furnishing the material used in the work provided for in the contract and for all the labor performed on the work, whether by subcontract or otherwise, "and that the said National Engineering & Construction Company had some arrangement, agreement or understanding with the Advance Engineering & Construction Company for the doing of such work or that the said Advance Engineering & Construction Company undertook to do such work and that the plaintiff (relator) herein did, at the request of the Advance Engineering & Construction Company, if it so find there was a request, performed the work and furnished the material referred to in the evidence to said Baden school . . . and that plaintiff (relator) has not been paid therefor, then its finding will be for plaintiff (relator) for the sum as the court may believe and find from the evi-

dence remains unpaid." It is true that this declaration is not very carefully or accurately drawn but we think that it indicates beyond all question that the learned trial judge held that it was essential to recovery by the relator that the court should find from the evidence in the case that relator was not a mere volunteer in doing the work but that it did it under a contract or arrangement or at the request of and for the original contractor or one in privity with that contractor. If it did, then there was such privity of contract between it and the original contractor as in our judgment made the surety liable for the payment of the value of the work done and material furnished. That was the essential point in the case. Hence we do not think that this assignment as to the instruction is well taken. The result reached is right on the facts.

We may concede that the propositions of law made by the learned counsel in his fifth point are correct propositions of law; the trouble, however, is, that they do not meet the case at bar. It is immaterial that at the time of entering upon the bond as surety, the surety may not have contemplated that it was to become liable for the Advance Engineering & Construction Company, if that Advance Engineering & Construction Company was not by contract in privity with the original contract, but if privity of contract existed or fell in at any time during the performance of the work originally contracted for, it is entirely immaterial as far as the surety is concerned, whether, at the time it entered upon its obligation of surety, it knew who the subcontractors were to be. It rarely occurs that at the time of entering into the contract and execution of the bond, the original contractor or the surety do know or can know who the various subcontractors, laborers and materialmen are thereafter to be, yet undoubtedly all contemplate that the bond is to stand good for those who come into the work,

either directly or indirectly, with the principal in the bond, that the surety is liable.

The remaining point of the learned counsel, that the contractor is a necessary party defendant against whom the debt must be established, is not applicable in the case at bar, for in this respect the analogy between proceedings under the mechanic's lien law and proceedings under a bond fails. The cause of action here is the breach of the condition of the bond. It is established by many cases that in a suit on the bond it is not essential that the principal should be made a party to that suit, particularly when it is true, as alleged and in evidence in this case, that that principal is insolvent.

To sum up: Granted that in the construction of the obligations of its contract, the surety is entitled to the benefit of the application of the ancient rule *strictissimi juris*, we find no violation of that rule in holding this surety responsible on this bond for payment of the claim of the relator. The contract between the board of education and the original contractor called for the furnishing of the heat ventilating appliance of one of three several systems named. The relator was owner of one of those systems, hence the selection of that system by the original contractor was strictly in accordance with the terms of the contract. If the original contractor had not provided this particular plant, or one of the others named, it was within the terms of the bond and of the contract, that the board of education would have one or the other installed and in that case could have held the original contractor and the surety, defendant here, on the bond for whatever amount, within the penalty of the bond, it would have cost to put in that plant, so that defendant in no manner whatever is harmed or injured by compelling it now to respond to the demand of relator for the unpaid balance due it for installing its regulating appliance.

Relator installed this plant by direct written contract with the Advance Engineering & Construction Company. The whole tendency of the testimony irresistably leads to the conclusion that the Advance Engineering Company had taken over the contract to do this work from the original contractors. Whether we call the Advance Engineering Company subcontractor or successor is not material, for by privity of contract, express or implied, between that company and the original contractor, the Advance Company took over the installation of the heating and ventilating appliance in the Baden school, and did install it according to the original contract. When it did that it was within the contract and the protection of the bond. The language of the bond is that the principals shall make payment to the parties furnishing material used in or doing labor for the work provided for in the contract "whether by subcontract or otherwise." It is immaterial whether the material was furnished and the work done was by subcontract—technically—or by agreement. The essential thing is that it was done under and within the terms of the original contract and not done by a mere volunteer.

Our conclusion on the whole case is that the judgment of the circuit court is for the right party and should be and is affirmed. *Nortoni and Caulfield, JJ.*, concur.

**MOLLIE EDWARDS, Respondent, v. ST. LOUIS &
SAN FRANCISCO RAILROAD COMPANY,
Appellant.**

**St. Louis Court of Appeals. Argued and Submitted June 3, 1912.
Opinion Filed July 2, 1912.**

1. **WITNESSES: Competency: Privileged Communications: Physician and Patient: Waiver.** Section 6362, Revised Statutes 1909, making a physician incompetent to testify as to certain information acquired from a patient while attending him in a professional character, creates a disqualification which the patient may waive but cannot be compelled to waive.
2. ———: ———: ———: ———: ———. In an action for personal injuries, *held* that plaintiff did not, by the testimony she gave at the trial, waive her attending physician's incompetency to testify against her under section 6362, Revised Statutes 1909.
3. ———: **Failure to Call: Physician and Patient: Instructions.** *Quære*, whether, in an action for personal injuries, where the plaintiff fails to call as a witness the physician who attended her, the defendant is entitled to have the jury instructed concerning such failure.
4. **APPELLATE PRACTICE: Questions Reviewable: Ruling Favorable to Appellant.** In an action for personal injuries, where plaintiff failed to call her attending physician as a witness, and the court refused an instruction offered by defendant that such failure was a strong circumstance against plaintiff, but gave one as favorable to defendant as the circumstances would permit, and defendant alone appealed, the appellate court will not decide whether or not any instruction should have been given on such subject.
5. **INSTRUCTIONS: Refusal: Covered by Other Instructions.** Where a requested instruction is covered, so far as correct, by another given, there is no error in refusing it.
6. **WITNESSES: Failure to Call: Physician and Patient: Instructions.** In an action for personal injuries, a requested instruction, that plaintiff's failure to call her attending physician to testify to the extent of her injuries might be considered by the jury as a "strong circumstance" against her, was properly refused.
7. **APPELLATE PRACTICE: Theory in Trial Court: Binding Effect.** In an action for personal injuries, where defendant

Edwards v. Railroad.

did not suggest in the trial court that plaintiff had waived the incompetency of her attending physician to testify against her, but asked the court to require plaintiff to waive her right, and, on that request being denied, placed the physician on the stand as a witness and asked him questions which were excluded on the ground they called for a privileged communication, and defendant did not then suggest that the privilege had been waived by plaintiff, the question of whether or not there was such waiver was not reviewable on appeal, under the rule that a party will not be allowed to assume, in the appellate court, an attitude inconsistent with that taken by him in the trial court.

Appeal from Dunklin Circuit Court.—*Hon. W. S. C. Walker*, Judge.

AFFIRMED.

W. F. Evans, Moses Whybark and A. P. Stewart for appellant.

(1) The court erred in overruling defendant's motion to require plaintiff to produce her attending physician as a witness for her. *Smart v. Kansas City*, 91 Mo. App. 593; *Evans v. Trenton*, 112 Mo. 403; *McClanahan v. Railroad*, 147 Mo. App. 410; *Reyburn v. Railroad*, 187 Mo. 575; 11 Am. & Eng. Ency. Law (2 Ed.), p. 503; 22 Am. & Eng. Ency. Law (2 Ed.), p. 1261. (2) Plaintiff testified as to the examination made by said physician, and his treatment of her. She thereby waived the privilege of the statute, and said physician became a competent witness for the defendant. The court erred in excluding the testimony of said physician offered by the defendant. Sec. 6362, R. S. 1909; *Webb v. Railroad*, 89 Mo. App. 604; *Higginfill v. Railroad*, 93 Mo. App. 223; *Holloway v. Kansas City*, 184 Mo. 44. (3) The court erred in refusing instruction No. 13, requested by defendant, and in giving of its own motion instruction No. 13a. Authorities cited under point 1.

Ward & Collins and B. L. Guffy for respondent.

(1) Though a physician called to attend upon a plaintiff professionally may learn all about the nature of his injuries or the disease said to have followed therefrom, and on one else may know so well as he, yet the plaintiff need not call him as a witness, and if he does not do so, no unfavorable inference should be drawn therefrom. *Arnold v. Maryville*, 110 Mo. App. 254; *Lane v. Railroad*, 21 Wash. 119; *Bank v. Lawrence*, 77 Minn. 282. (2) Appellant contends that plaintiff waived the privilege of the statute and said physician became a competent witness for the defendant. We maintain that these two positions are diametrically opposed to each other. In position 1, appellant contends that plaintiff should be made by the circuit court to waive her statutory right, and the court erred in refusing to require plaintiff to waive her statutory right; while in position 2 appellant says plaintiff did waive this right, and the court erred in not letting plaintiff's physician testify because plaintiff had waived her statutory right. The appellant cannot, upon an appeal, assume an attitude inconsistent to that taken by him on the trial. *Tomlinson v. Ellison*, 104 Mo. 105; *Steele v. Johnson*, 96 Mo. App. 147; *Heiman v. Larkin*, 108 Mo. App. 396.

REYNOLDS, P. J.—This is an action for personal injuries alleged to have been sustained by plaintiff, a passenger on one of defendant's trains, while alighting therefrom at Hayti, a station on the railroad. The acts of negligence alleged in the petition are that while plaintiff was in the act of alighting from the train at the station, the defendant company carelessly and negligently failed to stop and hold stationary the train at the station a reasonable length of time to permit plaintiff to alight, but carelessly and negligently caused the train to give a sudden start

while plaintiff was attempting to alight from it; that the station at which she was alighting was without lights; that it was dark.

It is further alleged that in attempting to alight plaintiff was thrown from the train and on to the platform, thereby greatly mangling, bruising and injuring her in her right leg and knee, breaking and tearing the ligaments of the knee and leg and breaking and fracturing the bones of the knee and greatly bruising her on her right arm and side. Making the usual allegations of pain and suffering and expenditure for physicians and alleging that the injury is permanent, plaintiff prayed damages in the sum of \$10,000.

The answer, after a general denial, contains a plea of contributory negligence.

There was evidence at the trial tending to establish the facts connected with the happening of the accident. Plaintiff testifying on direct examination, stated that when she fell her knee went between the car and the platform and that threw all her weight on her right side; she thought when she was assisted to her feet that she could walk home but she had to be picked up and helped over to a store where bystanders procured a buggy and took her home. She testified that the effect on her right knee was such as to cripple her for life. For more than three months after the accident she had never walked a step; was in bed about three months, suffered pain with her knee, which was swollen as large as a gallon bucket and very black, walked on crutches for a month and from that time on had not been able to bend her knee; her knee was not in that condition before she received the injury; it is so stiff now that she cannot move it at all. The kneecap was fractured and except this injury to the knee, although she was skinned and bruised, she sustained no other hurt. Has three children that she supports. She further testified that a Dr. Troutman was the physician who had attended her; does not know exactly how

many trips he made, sometimes he came twice a week; made the visits immediately after the injury and dressed the knee and bound it up. When in this condition she was required to lie on her back; her knee was in such shape that she could not turn over; that the injury was caused by the jerking of defendant's train and her fall; that her knee swelled up and got stiff; that she could not bend it any more and that it is still in that condition. Is thirty-five years old and her avocation is that of washing and ironing.

On cross-examination plaintiff testified that she had had rheumatism some three years before the trial but not to such an extent as to cripple her any, although it had swollen her knee joint. She further testified under cross-examination that she sent for Dr. Troutman immediately; supposed he had made an examination of her knee; said she was injured.

All the testimony in the case as to the nature and extent of the injury was by plaintiff herself, except that other witnesses testified to seeing the accident, to picking her up and assisting her to the store, one of them testifying that she could not take a step; that he had to carry her to the store. Witnesses also testified that they had seen her before the accident and had never noticed that she was crippled; that they knew she had been laid up in bed on account of the injury for five weeks or so, and that she walks with a limp, but no physician testified as to treatment or as to the extent of the injury.

At the conclusion of plaintiff's testimony counsel for defendant, calling the attention of the court to the fact that the evidence disclosed that Dr. Troutman was the physician who had treated plaintiff for her injury and that Dr. Troutman was now present in the court room and was present when plaintiff closed her case and had been in attendance in the court throughout the trial, asked the court to have plaintiff produce Dr. Troutman in court and place him on the stand as a

witness for her in this case, "so that the bar of the statute will be waived, and the defendant have full opportunity to examine him concerning the injuries he treated plaintiff for, and his knowledge of her condition when he treated her, and the effect of the injury, if any she received, had in disabling her." Counsel further remarked: "Plaintiff declines to produce him (Dr. Troutman) and closes her case. Defendant now requests the court to require the plaintiff to introduce the said physician relative to the injury for which he treated her." The court denied the application, defendant excepting.

Defendant thereupon introduced evidence tending to prove that plaintiff had limped more before she claimed to have met with the accident than she had since; that she walked about the same. Defendant then called Dr. Troutman, the physician before referred to, who testified he was a practicing physician; that he had been called on to treat plaintiff for an injury to her knee. He was asked what examination he made of her, and if he had discovered in examination, if he made one, any physical disability which was not necessary for him to perceive on the occasion in order to properly treat plaintiff for the injury which he had been called upon to treat her for. All of these questions were objected to on the statutory ground, the objection sustained and defendant excepted. The physician was then asked if he knew any facts concerning plaintiff's physical condition that were not obtained by him while the relation of physician and patient existed. He answered that he had seen her on the street and had noticed her walking in a crippled condition; that she walked crippled; has observed her since the accident and she seemed to be about the same as before. At the conclusion of the evidence defendant offered a demurrer to the evidence which was overruled, defendant excepting.

At the instance of plaintiff the court gave five instructions which it is unnecessary to notice as no complaint is made of them. At the instance of defendant the court gave twelve instructions and refused one numbered 13 which was in this form:

"You are further instructed that it is admitted by the plaintiff that Dr. T. J. Troutman was the physician who treated her for her injuries, and that he has been present in this court room as a witness in this cause, and the plaintiff has failed to introduce him and examine him as to her alleged injuries, and you are authorized, in determining the issues in this case, to take this fact into consideration to be strong circumstance against the plaintiff in this case under the facts in evidence in this cause, issues and evidence in this cause."

The court refused this as asked but gave in lieu of it this:

"You are further instructed that it is admitted by the plaintiff that Dr. T. J. Troutman was the physician who treated her for her injuries, and that he has been present in this court room as witness in this cause, and the plaintiff has failed to introduce him and examine him as to her alleged injuries, and you are authorized in determining the issues in this case to take this fact into consideration and give it such weight as you may deem it entitled to receive in determining the seriousness of the injury sustained by plaintiff, if any injury she did receive."

Defendant excepted to the refusal of the court to give its instruction No. 13 and to the giving of the last mentioned instruction of its own motion. The jury returned a verdict in favor of plaintiff for \$1500. Motion for new trial and in arrest were filed, overruled and exceptions saved and the cause duly appealed by defendant.

The only errors assigned before us by counsel for defendant are to the action of the court in over-

ruling defendant's motion to require plaintiff to produce her attending physician as a witness for her; that plaintiff having testified as to the examination made by the physician and his treatment of her thereby waived the privilege of the statute and the physician became a competent witness for defendant, and that the court had erred in excluding the testimony of the physician when offered by defendant; finally, that the court had erred in refusing instruction No. 13, requested by defendant and giving of its own motion the instruction in lieu thereof before set out.

We might very summarily dispose of this case by saying that none of these assignments are well taken, and that none of the authorities cited by the learned counsel for defendant sustain them. Our statute, section 6362, Revised Statutes 1909, provides that a physician or surgeon is incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." It has always been held under this statute that this is a disqualification which the patient is at liberty to waive. We know of no case that has ever held that the plaintiff could be compelled to waive this. In some cases it has been held that the patient had lost the benefit of the waiver by her acts or testimony in the case. If the question of waiver is in this case, we do not think that there had been any waiver. All that by any possibility can be construed into that was brought out in cross-examination by counsel for defendant; and we have set that out. The cases construing this clause of the statute have been very fully collated by the respective counsel and will undoubtedly appear in the report of this case. It would be a mere work of supererogation for us to recite or analyze them. Particular reli-

ance is placed by counsel on the opinion of this court in *McClanahan v. St. Louis & S. F. R. Co.*, 147 Mo. App. 386, 126 S. W. 535. It is true that in commenting on the facts in that case this court said that the failure to produce the attending physician and a member of the household, who was in the house when plaintiff came home immediately after the accident, was a strong circumstance against her. That remark was made, however, with the distinct statement (l. c. 413) that the matter of the failure to produce certain witnesses, among them surgeons who had attended the party immediately after she claimed to have been injured, was mentioned, "not in decision of the case, but as support for the view which we take of it, that in connection with the physical facts which are testified to beyond contradiction, the absence of this testimony of these physicians, as well as of the young man, . . . under the peculiar facts in this case, does make against the plaintiff." In the *McClanahan* case we held that the testimony of the injured party as to the character of her injury and her acts subsequent to that injury, were so contrary to known laws of nature as testified to by all the professional witnesses, that it would require very positive testimony to show an exception or suspension of those laws, and that as the case made by the injured party grafted an exception on these physical laws, it devolved upon the party injured to produce the best possible evidence to sustain her claim, and that this best evidence undoubtedly would have been the testimony of the surgeons who had attended her immediately after she claimed to have sustained the injury. In the case at bar no such facts are present. The plaintiff's own description of her injury, its extent and character, were all within known physical rules, and were not of such a character as required expert testimony in confirmation of her statements. No necessity existed in the case at bar for expert professional testimony. Plaintiff's inju-

ries and the result were open to the observation of any one. Whether plaintiff's account of the accident and its results was true, rested on the credence given her testimony by the jury, and the jury were properly instructed on the rule as to the weight to be given the testimony.

Whatever advantage defendant was entitled to by the failure of plaintiff to produce the physician as a witness was fully granted to it by the instruction given by the court of its own motion as a substitute for one covering the same proposition. We have very grave doubt as to whether the facts in this case called for any instruction of this character. Defendant here is the appellant; plaintiff below is the respondent and has not appealed. The only error assigned here is to refusing this instruction as asked. Any determination of this proposition which we might make would be without a hearing upon it from both parties. Hence we do not feel called upon here and now to determine whether any such instruction or instruction of like character is ever proper in any case, or should have been given in this case. The question is so doubtful that in the absence of aid from counsel for each of the parties by way of argument and citation to authority, we do not care to enter into a consideration of it. Learned counsel for appellant have gone into it quite fully, but that presents but one side of the question. Considering the assignment of the learned counsel for appellant, that it was error to refuse their thirteenth instruction as asked and to substitute for it the one given by the court of its own motion, we hold that defendant, having had the proposition submitted to the jury in a form very favorable to it, is in no position to complain. In the form asked, the instruction was wrong. It undertook to tell the jury in so many words that "in determining the issues in this case, to take this fact (the fact of the failure to call this physician) into consideration to be strong circumstance

against the plaintiff in this case under the facts in evidence in this cause, issues and evidence in this cause." No intimation of this court or of the Supreme Court in any case has ever gone to the extent of that instruction and it was properly refused.

Counsel here make the point that by her answer to a question asked of her on cross-examination, plaintiff had testified that she had sent for the physician immediately after the accident; that she supposed he made an examination of her knee and had said she was injured. Whether counsel can elicit testimony on cross-examination and then claim it to be a waiver, we need not now determine, as no suggestion that there had been any waiver by plaintiff of her privilege as to the physician was made in the trial court; no point on waiver there made. The proposition there made was that plaintiff should be required to waive her statutory right and that she had failed to do so. That is inconsistent with any waiver. Even when defendant, in putting in its testimony, placed the physician on the stand as its witness, and interrogated him and objection was made to the physician testifying as to what examination he had made of plaintiff, no suggestion was made that plaintiff had waived her privilege. In fact no suggestion of waiver was at any time made in the trial court, even in the motion for a new trial, nor was that point in any manner called to the attention of the trial court. Our court, following the Supreme Court and in harmony with the decisions of the Kansas City Court of Appeals, has held in many cases that a party cannot upon appeal assume an attitude inconsistent with that taken by him on the trial.

We see no reason to disturb the verdict and judgment in this cause. The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

SARAH McNULTY, Appellant, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Respondent.

St. Louis Court of Appeals. Submitted on Briefs October 9, 1911.
Opinion Filed December 5, 1911. Motion for Rehearing
Sustained. Cause Argued and Submitted June 3,
1912. Opinion Filed July 2, 1912.

1. **RAILROADS: Crossing Accident: Failure to Give Statutory Signals: Proximate Cause: Instructions.** In an action against a railroad company for the death of a child, killed by being struck by an engine at a crossing, an instruction given for defendant, that although the jury might believe that the bell on the engine was not constantly sounded for eighty rods before reaching the crossing, yet if they further found that such failure to ring the bell was not the direct or a contributing cause of the collision, their verdict should be for defendant, was not erroneous on the ground that it did not recognize defendant's duty to ring the bell constantly until the engine passed over the crossing, as required by section 3140, Revised Statutes 1909, for the reason that decedent was struck before the engine passed over the crossing, and hence the failure to keep the bell ringing while the engine was passing over it was immaterial; and, moreover, an instruction given for plaintiff covered the matter, by charging the jury that, before they could exempt defendant, the evidence must show, among other things, "that at the time said engine ran upon said crossing, the bell on said engine was rung eighty rods from said crossing and kept ringing until such engine crossed said street."
2. **APPELLATE PRACTICE: Conclusiveness of Verdict.** Where a question is properly submitted to a jury on conflicting evidence, their finding is conclusive.
3. **RAILROADS: Crossing Accident: Contributory Negligence of Child: Instructions.** In an action against a railroad company for the death of a child, eight years and seven months old, who was killed by being struck by an engine at a crossing, instructions submitting to the jury the question whether or not the child was guilty of contributory negligence are *held* free from error, so far as plaintiff is concerned.
4. **———: ———: Injury to Child: Suddenly Going in Front of Engine: Negligence: Proximate Cause.** The operator of a railroad engine is not required to anticipate that a child may leave a place of safety near the track and suddenly dart upon the track immediately in front of the engine, but has a right to assume that the child will remain in the place of

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safety, until it becomes reasonably apparent that he intends to cross the track, and if, after he starts to cross the track, the engine cannot be stopped in time to avert striking him, the railroad company can not be held liable for his death, on the ground the operator of the engine failed to keep a proper lookout ahead, since the keeping of a lookout would not have prevented the accident, and hence the failure to keep it was not the proximate cause of the accident.

5. ———: ———: ———: ———: ———: ———: Instructions: Facts Stated. A child, eight years and seven months old, was struck at a crossing by the tender of an engine, which was running backwards. The evidence most favorable for plaintiff tended to show that decedent was standing about twenty-five feet from the track and ran diagonally across the street toward the track, the engine then being thirty or forty feet away and running at a speed of from four to six miles per hour. When the engine was stopped after the collision, its nearest part (the front end) was fifteen feet beyond the point of collision. In an action against the railroad company for the death of the child, *held* that the evidence did not show the engine could have been stopped in time to have avoided the accident, even if the crew had seen decedent start to cross the street, and, therefore, the failure of the crew to look ahead of the engine could not have been the proximate cause of the accident; and hence it is *held*, that the court did not err in instructing the jury that plaintiff could not recover on the charge that defendant's servants failed to look ahead of the engine to see whether its movements endangered persons on the crossing, and failed to stop or slow up the engine before it struck the child.
6. TRIAL PRACTICE: Conclusions: Necessity of Being Founded on Facts. Courts and juries are at liberty to draw conclusions only when founded on facts in evidence, and the evidence must be substantial, a mere scintilla not being sufficient.
7. RAILROADS: Crossing Accident: Injury to Child: Last Chance Doctrine. Where the position of a child, eight years and seven months old, when seen by a crew operating an engine approaching a crossing, was not such as to lead them to suppose that she was in imminent danger of injury from the engine, and they had no chance to prevent running over her after she started to cross the track, there could be no recovery, under the last clear chance doctrine, for her death.

Appeal from St. Louis County Circuit Court.—*Hon. John W. McElhinney, Judge.*

AFFIRMED.

A. R. Taylor for appellant.

(1) It is no longer an open question in this state, that it is a duty incumbent upon the operators of a steam railroad, whenever prudence requires them to keep a watch for persons approaching or on the track and in danger, such watch must be kept, even for trespassers and licensees, as well as for persons who may lawfully be near or on the track. *Isabel v. Railroad*, 60 Mo. 481; *Werner v. Railroad*, 81 Mo. 374; *Fielier v. Railroad*, 107 Mo. 651; *Ahnefeld v. Railroad*, 212 Mo. 301; *Murphy v. Railroad*, 228 Mo. 79. (2) To watch out, as we have shown above, was to see this child as she ran toward the track. The fireman of 141 could see her. When he saw her or could, by the exercise of ordinary care have seen her, she was twenty-five to thirty feet away of the track. It was then the duty of the operators of the engine to have either stopped or slowed down the engine to save her life. *Livingston v. Railroad*, 170 Mo. 470; *Cytron v. Railroad*, 205 Mo. 719; *Ahnfeld v. Railroad*, 212 Mo. 301; *Morgan v. Railroad*, 228 Mo. 84; *Ellis v. Railroad*, 234 Mo. 679. (3) The evidence of Mr. Moore tends to show that this engine stopped when ten feet past the child. The engineer testified that the first intimation he had that anything happened some one hallooed just as we passed over the crossing. Then he brought his engine to a standstill. Here is evidence tending to prove that if the fireman had given him warning when the child started to run to the track, and when the engine was fifty feet away, he not only could have slowed up the engine and saved the child, but could have stopped the engine before he reached the place where the child was struck. The fact that the train was stopped in fifteen to thirty feet is proof conclusive that it could be so stopped. In the presence of physical facts, opinion evidence is not needed. *Beier v. Transit Co.*, 197 Mo. 231; *Latson v.*

Transit Co., 192 Mo. 466; Ellis v. Railroad, 234 Mo. 685; Moon v. Railroad, 237 Mo. 432. (4) The instruction given for defendant, numbered 9, was material and prejudicial error, because it deprived the plaintiff of a substantial ground of recovery pleaded in the petition and supported by evidence. It was a declaration of law that this ground of recovery could not be considered by the jury. When there is evidence to support a valid ground of recovery pleaded, it is prejudicial error to give such instruction. Meily v. Railroad, 215 Mo. 567; Kienlen v. Railroad, 216 Mo. 145; Luehrmann v. Gas Co., 127 Mo. App. 127; Lloyd v. Railroad, 128 Mo. 595; Rene v. Kansas City, 204 Mo. 269; Hack v. Railroad, 208 Mo. 581; Koerner v. Gas Co., 209 Mo. 144; Merritt v. Matchott, 135 Mo. App. 176. (5) Instruction number 10, was prejudicial error, in that it deprived the plaintiff of the legal presumption that the failure to ring the bell eighty rods from the crossing was the cause of the killing. Stotler v. Railroad, 200 Mo. 107; McNulty v. Railroad, 203 Mo. 475; McGee v. Railroad, 214 Mo. 530; Atterberry v. Railroad, 110 Mo. App. 608; Day v. Railroad, 132 Mo. App. 707. (6) Instruction number 11 was erroneous because it predicates the duty to ring the bell eighty rods from the crossing and until reaching the crossing, but does not require the ringing of the bell constantly until the engine passed the crossing as required by statute. Sec. 314 R. S. 1909; Bell v. Railroad, 72 Mo. 50; Spiller v. Railroad, 112 Mo. App. 491; Her-ring v. Railroad, 80 Mo. App. 562; Elliott v. Railroad, 105 Mo. App. 523; Ried v. Railroad, 107 Mo. App. 238.

W. F. Evans and Jones, Jones, Hocker & Davis
for respondent.

(1) Where the petition charges negligence on part of the defendant on different theories, and there is no evidence to support one of his charges, he cannot go to the jury on that theory. Boland v. Railroad,

36 Mo. 484; Storage & Moving Co. v. St. Louis Transfer Company, 120 Mo. App. 410; Houck v. Cook, 116 Mo. 559; Heinzie v. Ry., 182 Mo. 528; Keown v. Railroad, 141 Mo. 86; Davis v. Thompson, 209 Mo. 192; Milliken v. Commission Co., 202 Mo. 637. (2) Where one of the charges of negligence in plaintiff's petition fails to show by the evidence that such negligence was the proximate cause of the injury he cannot go to the jury on that charge. Theobold v. Transit Co., 191 Mo. 433; Warner v. St. Louis, 178 Mo. 125; Winter v. Railroad, 99 Mo. 518; Meeker v. Railroad, 178 Mo. 173; Byerly v. Light & Power Co., 130 Mo. App. 593; Jackson v. Elevator Co., 209 Mo. 506.

REYNOLDS, P. J.—This action was originally brought in the circuit court of the city of St. Louis, by the father and mother, under the provisions of section 2864, Revised Statutes 1899, to recover \$5000, the penalty given by the section, for the death of their infant daughter. The case was taken on change of venue to the circuit court of St. Louis county. The father died pending the action and it has since been prosecuted by the mother. The accident and the death occurred on the morning of the 15th of May, 1900.

It appears that this was the second trial of this case in the circuit court, there being a verdict for defendant on the former trial, which the trial court set aside for error in instructions given for defendant. Defendant appealed from that to the Supreme Court where the action of the trial court was affirmed and the cause remanded. [See McNulty v. St. Louis & S. F. R. Co., 203 Mo. 475, 101 S. W. 1082.]

This second trial was before the court and a jury and there was a verdict in favor of defendant. Judgment followed from which plaintiff appealed to the Supreme Court, the amount involved at that time exceeding the jurisdiction of this court. Pending the submission of the cause to the Supreme Court the

jurisdictional amount of this court was changed from \$4500 to \$7500 under Act of the General Assembly, June 12, 1909, page 397, now section 3937, Revised Statutes 1909, and the cause was transferred by the Supreme Court to this court. It was first submitted to us on printed briefs and argument by respondent and taken as submitted on briefs by appellant. Holding that the trial court erred in giving the ninth instruction, we reversed the judgment and remanded the cause. Counsel for defendant, filing a motion for rehearing and that being sustained, the cause has again been submitted orally and on printed briefs and arguments.

At the instance of plaintiff the court gave seven instructions which appear to be all that were asked by plaintiff.

At the request of defendant the court gave five instructions, numbered from eight to thirteen. The errors assigned are to those numbered nine, ten and eleven. The correctness of instruction No. 9 is the principal point of controversy on this rehearing. We, however, reproduce the three instructions on which error is assigned.

The ninth instruction told the jury that under the pleadings and evidence plaintiff could not recover on the charge that defendant's servants failed to look ahead of the engine and tender to see if the movement endangered persons on the crossing and failed to stop or slow up the engine and tender before it struck the child.

The tenth instruction told the jury that before plaintiff could recover in this action "she must establish the fact that defendant was negligent in the respect or respects stated in other instructions, by the proper or greater weight of the testimony."

The eleventh instruction told the jury that even though they might find from the greater weight of the

evidence that the bell of the engine which struck the child was not constantly sounded for eighty rods before reaching Theresa avenue crossing, yet if they also found from the evidence that such failure to ring the bell was not a direct and immediate cause producing or contributing to cause the injury and death of plaintiff's child, their finding should be for defendant on that issue.

Taking up these instructions in inverse order we say:

First: The criticism of the eleventh instruction is that it recognizes the duty of ringing the bell eighty rods from the crossing and until reaching the crossing but does not require the ringing of the bell constantly until the engine passed the crossing, as required by statute, now section 3140, Revised Statutes 1909.

In *Pope v. Wabash Railroad Co.*, — Mo. —, 146 S. W. 790, it is said: "The object of a signal is to give warning and if those on the track knew of the train's approach without the signal, in time to escape from danger, then failure to give the signal is of no legal importance." Several cases are cited in support of this, among others *McManamee v. Missouri Pac. Ry. Co.*, 135 Mo. 440, l. c. 449, 37 S. W. 119. See, also, *Illinois Central R. Co. v. Dupres*, 138 Ky. 459, l. c. 462, 128 S. W. 334. Here the failure to keep the bell ringing while crossing the street was wholly immaterial, for the child was struck before the engine had passed over the street. Moreover, one of plaintiff's own instructions cover this, for it distinctly told the jury that to exempt defendant, it must, among other things, appear from the evidence "that at the time said engine and tender ran upon said crossing the bell on said engine was rung eighty rods from said crossing and kept ringing until such engine crossed said street."

Second: The argument in support of the error assigned to the tenth instruction is practically the same as to the eleventh and for the reasons given above that assignment is not tenable.

Third: This brings us to consideration of the ninth instruction.

It is necessary to a proper consideration of this to notice the testimony more fully than we did in the former opinion.

On the morning of the day of the accident the daughter of appellant, a little girl, eight years and seven months old at the time of the accident, on her way to school, had to cross defendant's tracks on Theresa avenue in the city of St. Louis. Her mother, the plaintiff, testifying, said of her: "She was a strong, healthy child and a wise one too." The family had lived during all the life of the little girl within a block of and to the south of the street upon which the railroad tracks were located. "The little girl crossed these tracks every day going to school. . . . She had gone to school for a year and a half and the trains passing pretty much all the time. Told the child to be careful. She was a smart child. Let her go alone; never had thought of the railroad crossing at all." Theresa avenue runs north and south, the railroad tracks from west to east, crossing the avenue at a right angle. Besides the tracks of the defendant railroad which there cross the avenue are the tracks of the Wabash, the Missouri Pacific and perhaps others. The Wabash tracks appear to be south of those of the defendant and closer in toward the street pavement. The railroad companies had a watchman at this crossing.

A young lady, who was in sight of the accident but north of the tracks and on the east side of Theresa avenue, testified that she did not see the child when struck; saw her under the tender; tender was in front of engine; first saw the child when she was in the

middle of the street; saw her hat whirling and next saw her lying in the middle of the road; was a block or a block and a half or two blocks away when she saw the hat whirling. A lady companion of this witness testified that when she first noticed the child she saw her lying in the road.

A teamster, witness for plaintiff, testified that he was within a couple of hundred feet of the little girl when she was killed; saw the engine "come and shoot right by and pick her up and drag her right along." The child was carried some distance. At the time the engine shot across the street and caught the child, the watchman was waving his flag "to beat the band. . . . The engine ran about 150 feet east of Theresa avenue before it stopped."

Another witness for plaintiff testified that he was about thirty feet behind the child, driving his team; "did not see the child hit, saw her right after, lying in the middle of the street; the engine ran seventy-five or one hundred feet east of Theresa avenue before it stopped." The engine crossed about twenty-five feet ahead of his team. On cross-examination this witness said he first saw the little girl south of the tracks; she was going north, walking by herself; she walked past him. "She was going a pretty good gait;" was a hundred feet south of the Frisco tracks when she passed his wagon; was thirty feet ahead of him when the accident happened.

This was practically all of the testimony of plaintiff and she rested, whereupon defendant asked an instruction in the nature of a demurrer which being refused, defendant excepted.

Defendant thereupon introduced the crossing watchman, who testified that he saw the little girl coming along the street toward the crossing, on the west sidewalk. There were two gentlemen coming along with her. He raised his flag and shook it at her and said, "Now don't try to cross, dear." She was

between the tracks of the Frisco inbound and those of the Wabash and on the west side of Theresa avenue. When he spoke to the little girl she smiled and stopped and those two gentlemen stopped with her, whoever they were. When he told her not to cross, she stopped and he turned his head to see how close the second engine was following the first and turned his head right back again to the crossing and saw the little girl rolling along the track on the north side of the engine and dropped his flag and jumped to catch her. On cross-examination this watchman said that when he spoke to the little girl she was south of the tracks and on the west side of the street. She was about twenty-five feet from the inbound Frisco track; he, witness, was on the north track. The Wabash and Frisco tracks are about thirty or forty feet apart, the Wabash south of the Frisco. There were two Frisco engines backing in on the inbound track—one following the other, about 100 or 150 feet apart. When he spoke to the little girl he was standing in the center of the street, near the out-bound track, which is the north track, and the little girl was twenty-five or thirty feet south of the inbound track, which is the south track. He was standing north of the outbound track. The two tracks of the Frisco are about eight feet apart. When he first spoke to the child the first engine (No. 141) was about fifty feet away; it was the tank of this engine that struck her. He waved his flag at her and told her not to try to cross, and she stopped. He did nothing else but stand there. Turned his eyes and noticed how close the second engine was following the first, and turned his eyes to the crossing and saw the little girl rolling along the track on the north rail. Asked if the first engine and tender had already passed, he answered: "It went past and stopped just about an engine length east of where the girl lay when we picked her up. . . . It was the first engine (No. 141) backing up

that struck her." After the tank passed between him and the little girl he could not see anything of her until he saw her on the track. She was struck by the tank. He did not look to see how she came from where she stopped to where she was struck; could not see. Asked what was between him and the child, he answered, "Before the tender got to her she was standing still." Asked, "How did she jump twenty-five feet in front of the tank?" he answered: "They were making about five or six miles an hour. It is very easy when one has got ten or fifteen feet of a start to undertake to get over." Asked if the tank could have obscured his vision until it got between him and the little girl, he said "No." The child was about twenty-five feet away and was standing there when the tank was approaching. Asked if the child had come from the place where she was standing and got in front of that tank, whether he could not see her, he answered: "She didn't come—from all the information that I found, she couldn't come right across. She came angling across the way." He was in the middle of the street and about thirty feet east and thirty feet north of the little girl; in the middle of a sixty-foot street, and she was on the west side of the street; could see her until the tank got between him and the child and after the tank got between them he could not see the little girl. Asked if from the time he saw the child standing on the west sidewalk and south of the track, until the eastern part of the tender reached the sidewalk and from the time it got twelve or fifteen feet east of there, he could have seen the child if he had looked, he answered: "No, sir; I couldn't either. Put you in the same position and you wouldn't see her." When he waved his flag at the little girl, she smiled and stopped; gave no signal at all to the oncoming engine, either that the track was clear or otherwise.

An expressman testified that he saw the little girl start off to cross—"she started at a swift pace, a run you might call it."

A switchman on the following engine testified that the two engines were about two hundred feet apart; saw the little girl run on the track to get past the engine. The first he saw of her she was running; did not see her before she started to run. On cross-examination he said he could not say how far away from the crossing the head of the engine was when the child started to cross; does not know "whether she was on the street or in the yard when he saw her run. She was running to get around the engine." He at first said that when he saw the little girl start to run, she was one hundred or one hundred and twenty-five feet from the track; afterwards he put the distance at "about twenty-five feet."

The locomotive fireman of No. 146, the following engine, riding on his engine, saw the little girl before she was struck, standing on the south side of the inbound main line about fifteen or twenty feet from the track on the west side near the sidewalk. The watchman beckoned to her and she smiled and then started to cross; does not remember whether she went straight across; did not see her struck; saw her come out on the north side of the engine; saw her lying on the east side of the street by the side of the north rail of the track. On cross-examination he testified that there was an obstruction which prevented the engineer of No. 141 from seeing the child; the fireman could see her. Witness "could distinguish the smile on the little child's face 200 feet away; she paused a second and then went on." Asked, "Or did she pause at all?" he answered, "Yes, sir; she hesitated." Question. "She hesitated and then went on?" Answer. "Yes, sir." Witness could not say whether she went straight across along the sidewalk or went the other way.

The general yard-master of defendant was riding on No. 141 at the time of the accident; saw the little girl standing on the south side of the tracks; she was standing still when he first observed her; could not see the watchman; he was on the opposite side. The little girl was standing between the Wabash and Frisco tracks, ten or fifteen feet from the Frisco tracks. When the engine was within ten feet of the sidewalk, she started to run diagonally across the street and tracks and passed out of his view. He hallooed to the engineer to stop and he immediately applied the brakes and witness immediately went to the other side, got down and saw the child lying there northwest of the tracks. The engine was ten or fifteen feet past the child and was moving four or five miles an hour. On cross-examination this witness repeated that the engine was moving not faster than four or five miles an hour; that the little girl started diagonally across the track in the same direction the engine was moving and as soon as he saw her start he hallooed to the engineer and crossed to the engineer's side to see if the child cleared; saw her disappear behind the end of the tender and thought she had gotten across. The east end of the tender was about one-third the way across the street when the girl disappeared behind the tender; about fifteen or twenty feet from the sidewalk or building line. She was running probably as hard as she could run. At the time she started the east end of the tender was ten or fifteen feet west of the sidewalk from where she started.

The locomotive engineer of engine 141 testified that the engine was backing down from the Chouteau avenue yards and he was on the north side of the engine, the bell was ringing constantly and he had whistled for the crossing; saw the watchman on the crossing waving his flag. The engine was going five or six miles an hour; did not see the little girl before the accident. When he first saw her she was on the

north side of the track; stopped the engine after passing Theresa avenue. The first intimation he had that anything had happened was that some one hallooed just as the engine passed over the crossing; then he brought his engine to a standstill.

The fireman of the engine that struck the child testified that he was on the south side of the engine as it backed down; saw the little girl standing on the south side of the main line of the inbound track, about ten or fifteen feet from the track. Witness was looking toward the east. The child was standing still when he first saw her. After he first saw her he shut off the injector and the water and then got a glimpse of the child going back of the tank. He had to look after the water of his engine. It was not very long from the time he first saw the child until he saw her again; when he first saw her she was not close enough to be struck by a passing train; was ten or fifteen feet from the track. The next time he saw her she was disappearing behind the tank. On cross-examination he testified that when he first saw the little girl she was standing south of the Frisco tracks; does not know whether she was south of the Wabash tracks or not but she was ten or fifteen feet south of the Frisco tracks; could not say how long she stood there; had not moved while he looked at her; had not seen the watchman flag him; did not pay any attention to any one else standing there and could not say in what part of the street the child was when he first caught a glimpse of her. She was on the west walk or west side of the street and when he caught a glimpse of her going behind the tender he could not say how far out in the street she was.

Another witness in the service of the Terminal Railway at the time of the trial testified that on the day of the accident he was in the wall paper business and was going north on Theresa avenue when the child was killed; was on the east side of Theresa avenue and

saw the little girl. She was south of the Wabash tracks, in front of him and on the west side of the street; saw the watchman come out of his shanty and motion with his flag and heard him say something to the girl and she stopped, "she stopped for just a couple of seconds and then she started to run diagonally from the west side of the street to the east side and supposed she stubbed her toe and fell." The engine was thirty or forty feet west of the crossing when the child started to run across there. She ran "behind the tender," said the witness (evidently meaning in front of the backing tender), and was struck by the north side of the tender and fell on the north rail of the inbound track. On cross-examination this witness testified that the little girl paused a very short time; she was then on the west side of Theresa avenue. When she paused she was right at the Wabash tracks, which are eighteen or twenty feet from the Frisco tracks. "She started and had a pretty good move on her; at that time the engine was thirty or forty feet west of the crossing. The girl ran around the tank of the engine, near the middle of the street." It seemed to witness that she fell. The engine must have been six or eight feet from her when she fell.

This is practically the evidence in the case. In stating that part of it which bears upon this ninth instruction, we have not confined ourselves to the abstract prepared by counsel but where we were in some doubt as to whether that abstract gave the context of certain parts of the testimony with sufficient accuracy to enable us to determine exactly what the testimony was, we have not hesitated to resort to the complete transcript which was brought up and is before us. We have not set out all the testimony relating to the sounding of the whistle and ringing of the bell. It may be said as to the latter that the affirmative testimony tends to show that the bell was sounded from the time the engine left Grand avenue, which is several blocks

west of Theresa, and thence onward east to the place of the accident. The only evidence that might be said to challenge this is the negative evidence of two or more witnesses, that they did not hear either a bell or a whistle. That matter, however, was properly submitted to the jury, as we have before stated, and the finding of the jury is conclusive on it. Nor have we set out the evidence as to the character of this particular crossing. It is sufficient to say of it that it appears to have been one over which people and teams were constantly passing at all hours of the day and it appears to have been in the vicinity of and on the way to the public school which the little girl attended and was used by teachers and pupils of that school when going to and returning from it.

While the answer in this case, after a general denial, pleads the contributory negligence of the little girl, the case was not submitted to the jury on that issue in like manner as where the injured party is an adult. On the contrary, the instructions asked by and given at the instance of plaintiff, distinctly take notice of the fact that the injured party was a mere child, her mother testifying that at the time of the accident she was eight years and seven months of age.

By the first instruction given at the instance of plaintiff, the court told the jury that if they found from the evidence that Mary McNulty "at the time of her death exercised ordinary care according to her age, discretion and experience and such as a child of her age, discretion and experience would exercise under the same or similar circumstances to watch out for cars or engines at such crossing and to avoid injury therefrom, then plaintiff is entitled to recover \$5000," the instruction, in the part preceding this, stating the other facts necessary to a recovery. This same direction is in the second instruction given at the request of plaintiff, its concluding sentence being that if the jury found from the evidence "that plain-

tiff's child was exercising ordinary care at the time of her injury as defined in the other instructions," plaintiff was entitled to recover.

The third instruction given at the instance of plaintiff placed the case before the jury in this language: "The court instructs the jury that the burden of proving that the deceased, Mary McNulty, did not exercise ordinary care according to her age, discretion and experience, and such care as a child of her age, discretion and experience would exercise under the same or similar circumstances, is upon the defendant in this case."

The sixth instruction told the jury that if they found from the evidence that the child "exercised ordinary care according to her age, discretion and experience at the time of her injury to avoid danger, and such care as could be expected from a child of her age, discretion and experience under the same or similar circumstances, then she was not guilty of contributory negligence, and this action cannot be defeated on that issue." No instructions given at the instance of defendant controverted these propositions. In fact instruction numbered 13, given at the instance of defendant, told the jury that if plaintiff's deceased child "was of sufficient age and discretion to appreciate the danger from being struck by a moving engine and train, and the danger from crossings on which engines and trains were being constantly moved, then it became and was the duty of plaintiff's said child to exercise ordinary care according to her age, discretion and experience in avoiding danger therefrom. And if you find that the death of said child was the direct result of a failure of said child to exercise such care, plaintiff cannot recover even though you should also find that defendant was also negligent in not ringing its bell or in otherwise giving warning." No error is assigned to this instruction by counsel for appellant. It will therefore be seen that the learned trial court submitted

the question of the responsibility of this child in exact compliance with the rule announced by our Supreme Court in *Holmes v. Missouri Pac. R. Co.*, 190 Mo. 98, 88 S. W. 623. There it is held that when the person injured is a child, that child is not to be held negligent if it exercised that degree of care which under like circumstances would reasonably be expected of one of its years and capacity; and whether the child used such care in a particular case, is a question for the jury. In the *Holmes* case the child was eight years old at the time it was killed by being run over by a locomotive engine of the defendant company.

In *Spillane v. Missouri Pac. Ry. Co.*, 135 Mo. 414, 37 S. W. 198, the plaintiff to whose use the action was brought was a boy nine years and about four months old. Judge GANTT, speaking for our Supreme Court in that case, said (l. c. 426): "When the facts disclose that an infant is old enough to know the danger of going upon railroad tracks; that he is intelligent and is conversant with the management of trains thereon, we know of no principle of law which would absolve him from the duty of looking and listening for trains and from avoiding danger by getting off of the tracks. In this connection the analogies of the law respecting the doctrine of *doli capax* seem pertinent and may be invoked by way of illustration. . . . Doubtless a boy of this age living as plaintiff did for years in the immediate vicinity of this crossing knew the danger that he would incur in crossing the tracks better than thousands of adults who rarely have occasion to cross railroad tracks and yet are conclusively presumed negligent if they attempt to cross them without looking or listening."

In *Ridenour v. Kansas City Cable Ry. Co.*, 102 Mo. 270, 13 S. W. 889, 14 S. W. 760, a case in which the plaintiff was a boy ten years old at the time of the injury Judge BARCLAY speaking for all of the court except Judge SHERWOOD, who dissented on

another ground, however, said (l. c. 286-7) that while the law makes due allowance for the thoughtlessness and indiscretion of youth, it does not hold him necessarily irresponsible. "A child must be very much younger than plaintiff to warrant the court in declaring, as a conclusion of law, that he is incapable of negligence. To the extent that a child has knowledge and understanding of a danger or where it is of such nature as to be obvious even to one of his years he is under a legal duty to avoid it. . . . The standard of his (plaintiff's) duty was such reasonable care and diligence as characterized the average boy of his age. He would be legally responsible for a failure to exercise such care." This case is cited approvingly in both the Spillane and Holmes cases.

The authorities on the responsibility of a minor are so fully collated and the doctrine so thoroughly discussed by Judge NORTON, speaking for this court, in *Herd v. Koenig*, 137 Mo. App. 589, 119 S. W. 56, that it is unnecessary for us to go into them here. In the *Herd* case the plaintiff was a boy ten and a half years of age. Our court held that a boy of his age, knowing the dangers incident to playing around the place where the accident occurred and knowing its unsafe condition, who had been repeatedly warned against playing around the premises, and who in disregard of these warnings was injured, was guilty of contributory negligence as a matter of law and could not recover for the injury so sustained. Whether the rule announced in the *Holmes* case or that announced in the *Spillane* case is to be followed here in considering the age of this child, is not necessary for determination, for, as we have before stated, the learned trial court very fully and by assent of counsel in the case announced the law for this case to be that in determining the act of the child the jury could take into consideration her age, and the trial court, as held proper in the *Holmes* case, submitted that question

as a question of fact to the determination of the jury. Most certainly appellant has no ground of complaint on these instructions.

The case then resolves itself, under the ninth instruction, as one turning upon the acts of the employees of the defendant.

The case nearest in line covering this phase of it that has been called to our attention is that of Illinois Cent. Ry. Co. v. Dupree, 138 Ky. 459, 128 S. W. 334, heretofore referred to by us on another proposition. In that case the facts save as to the age of the child are very much in line with the facts in the case at bar. In the Dupree case the child who was injured in consequence of being run over by a freight train of the railroad company was five years of age at the time of the accident. While attempting to cross the railroad tracks at a public crossing she was run over by a freight train and her feet so crushed that amputation became necessary. It is stated in the opinion (l. c. 463) that there was evidence tending to show that the train was running very fast and the court stated that it might be admitted that if the child had been standing on the track or had gone upon the track when the train was some distance away, the speed of the train might have played some part in the accident. The court, after calling attention to this, says: "According to all the proof, however, the child darted across the track immediately in front of the engine. Those in charge of the engine could not have anticipated that the child, who was in a place of safety, would suddenly take a notion to run across the track immediately in front of the engine. They had a right to assume that she would remain in a place of safety until it became reasonably apparent that she intended to cross the track. When she did start across the track, everything was done that could have been done to avoid the injury. As she ran rapidly and immediately in front of the engine, it is immaterial whether

the speed of the train was five, ten or fifteen miles an hour, for no power on earth could have stopped the train in time to avoid the injury. That being the case, the appellee (the plaintiff) failed to show that the negligence of appellant was the proximate cause of the injury complained of. On the contrary, all the evidence goes to show that appellee's injuries were the result of an unfortunate accident, for which appellant was in nowise responsible." That corresponds to the facts in this case so completely and is so entirely in harmony with the general doctrine of our own state, that we accept it as a correct statement of the law as applicable to the facts in this case and in justification of the action of the learned trial court in giving this ninth instruction.

With very great earnestness the learned and experienced counsel for appellant insists that if a proper lookout had been kept those in charge of the locomotive engine which was backing down on this track could have seen the child start to cross the track; that they did see her or could have seen her as she started to cross; that the engine was moving at such a low rate of speed, from four to six miles an hour, that they could have stopped before the child covered the fifteen or twenty-five feet between where she is proved to have been standing and the place at which she was struck. A very ingenious mathematical demonstration of the relative speed of the locomotive and of the child and of the relative distance to be covered is attempted in support of this theory. The trouble with this theory and attempted demonstration is, that they are not sustained by the evidence in the case. It is true that there is a dispute as to whether the child was standing twenty-five feet from the track at the time she started across, or ten or fifteen feet. Even assuming that it was twenty-five feet, the evidence does not show that had those on the engine seen her start from that point, the engine going at the speed

it was, could have stopped it in time to avoid hitting her. There is evidence of one or more witnesses that when the engine was stopped it was about fifteen feet beyond where the child was struck. Other witnesses placed it further, but giving plaintiff the benefit of assuming that the engine stopped fifteen feet from where the child lay, and that when the child started to cross the rear of the tender or water tank of the engine was as much as thirty or forty feet from the place where she attempted to cross, it is to be remembered that the engine and its preceding tender or water tank went not only this thirty or forty feet and fifteen feet beyond where the child was struck but also the length of the tender and engine beyond that, for the rear of the engine, according to the testimony, was that part which was fifteen feet beyond where the body of the child lay. It is true that when the watchman called to her he says the engine was then fifty feet from her, but there is positive testimony given by those who saw her start across that the engine was then thirty or forty feet away. Even assuming that the speed of the engine was only four miles an hour, as one witness says, although the trainmen give it at from five to six miles an hour, we cannot agree with learned counsel for appellant that this demonstrates beyond question that if the men in charge of the locomotive had seen, or by proper outlook could have seen the child start, then the engine and tender could have been stopped before the child was hit. Nor can we overlook the fact that this attempted demonstration by counsel rests entirely on theory. There is no evidence in the case that this engine and tender could have been stopped in time to have avoided hitting the child, even if the crew had seen her start to cross. No witness, competent from experience and observation, testified to this as a fact; even assuming that the jurors were familiar with the laws of mechanics, of kinetics, there are not sufficient facts in evidence from

which they could have solved this mechanical problem. Courts and juries are at liberty to draw conclusions only when founded on facts in evidence. The evidence, too, must be substantial—for as held by our Supreme Court in *Dutcher v. Wabash R. R. Co.*, 241 Mo. 137, 145 S. W. 63, a mere scintilla is not sufficient—and we find no evidence in this case warranting the jury in finding negligence upon the part of the defendant's employees.

It must be remembered that this was not an affair of even a moment; it all happened in seconds. The only witness who appears to have actually seen the occurrence, testified that when the child started to cross she started on a run when the tender of the engine was within fifteen or twenty feet of her. The watchman did not see her start across, for until the tender of the engine came between him and the child, she was standing still. When she started she ran diagonally across the street immediately in front of the oncoming danger. Before she crossed the track or had cleared the north rail her hat flew off and she stumbled and fell, falling between the rails or near the north rail, exactly where is not very clear, and was struck and killed. There is no evidence whatever in the case on which to found a conclusion that any care on the part of those in charge of the engine could have prevented the catastrophe. We are not prepared to hold that when a train crew approaching a crossing sees a child standing alongside of the rails but beyond danger, they are to assume that she may attempt to pass ahead of them and must stop.

We hold, therefore, that the ninth instruction was properly given.

Neither the humanitarian nor the last clear chance rule are involved or were invoked here. If we were to apply either to the facts, we do not think that this defendant, even considering the age of the child, could be held to have violated them. [*Baecker v. Mis-*

souri Pacific Ry. Co., — Mo. —, 144 S. W. 803.] The position of the child when she was seen by those operating this locomotive was not such as to lead them to suppose that she was in imminent danger of injury from the oncoming machine, nor had they any chance—any opportunity to save her.

The result is that the verdict of the jury and the judgment of the circuit court thereon should be affirmed, and our former judgment of reversal and remander set aside. It is so ordered. *Nortoni*, and *Caulfield, JJ.*, concur.

GEORGE W. MICHAEL et al., Respondents, v. R. R.
KENNEDY Appellant.

St. Louis Court of Appeals. Submitted on Briefs June 5, 1912.
Opinion Filed July 2 1912.

1. **PARTNERSHIP: Action on Contract: Pleading: Variance.** In an action by partners on a contract alleged to have been entered into between the plaintiffs, as partners, and the defendant, the plaintiffs can not recover on proof of a contract made by the defendant with one of them individually.
2. **REAL ESTATE BROKERS: Action for Commission: Sufficiency of Evidence.** In an action by a firm of real estate brokers for a commission in effecting a sale of land for \$4400, an averment in the petition, that defendant had agreed to pay plaintiffs any amount in excess of \$4000 realized from the sale, was not supported by a letter from one of the plaintiffs to defendant, stating that he was offered \$4000 for defendant's land and asked no commission, and a telegram from defendant in response, stating that he would take \$4000.
3. **CONTRACTS: Pleading: Variance.** One suing on a special contract must recover thereon, or not at all, and cannot recover as for money had and received.
4. ———: "Contract" and "Agreement" Synonyms. There is no difference between a "contract" and an "agreement."

Appeal from New Madrid Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED.

Brewer & Riley for appellant.

(1) The plaintiffs sue on a special contract, and therefore he must recover upon that or not at all in this action. *Cole v. Armour*, 154 Mo. 350; *Koons v. Car Co.*, 203 Mo. 255. (2) This cause ought to be reversed for the further reason the petition alleges a contract between the defendant and a copartnership, while the proof shows that the contract was with the plaintiff, George W. Michael, and it nowhere appears therefrom that it was a contract in behalf of the partnership. *Hilliker v. Francisco*, 65 Mo. 298.

Brown & Gallivan, for respondent, filed argument.

REYNOLDS, P. J.—This is an action by plaintiffs in which the petition sets out that plaintiffs are partners doing a real estate business under the firm name and style of Michael & Son; that this firm on or about November, 1909, contracted to sell for defendant 220 acres of real estate situate in Craighead county, Arkansas, describing it, at and for the sum of \$4000, “these plaintiffs to have the amount over and above said sum of \$4000 which was to be paid by the purchaser as a commission to the plaintiffs herein.” It is further averred that the sale was made according to contract by plaintiffs and that defendant collected the full sum of \$4400 but failed, refused and neglected to pay the sum of \$400 to plaintiffs, “although demanded so to do.” Judgment is prayed for the \$400.

The answer is a general denial.

The cause was tried before the court, a jury having been waived. The court found for plaintiffs and rendered judgment accordingly, from which judgment, defendant, filing a motion for new trial and one in arrest, has duly perfected his appeal to this court.

The plaintiff George W. Michael was the only witness in the case introduced on the part of plaintiffs.

He testified that his son and himself were a partnership known as Michael & Son. He was asked if he, as a real estate man, had sold a piece of land for defendant in Craighead county, Arkansas, and he answered that he did. He further testified that all communications between himself and defendant were in the shape of a letter and telegram and that whatever contract existed between them is evidenced by the letter and telegram. The letter referred to was on a letterhead reading "Michael & Son, exclusive agents for three hundred thousand acres of land in Southeast Missouri." Addressed to defendant Kennedy, and dated Campbell, Mo., November 10, 1909, it is as follows:

"I am offered even \$4000 for your 220 acres in Craighead county, Arkansas. Payment, one-third down; one-third in one year, and one-third in two years, at seven per cent. I have been working on this for two months and have finally got an offer. Will you take it? Let me know by telegram. I talked rice and went with him to Stuttgart and showed him the fields. This is surely well sold. I ask no commission, as mine goes with it and he wanted all or none.

Kindly yours,

G. W. MICHAEL."

Defendant answered this letter by a telegram from Spencerville, Ohio, under date of November 12th, and addressed to George W. Michael, Campbell, Mo., as follows:

"Will take \$4000 for Craighead county, Arkansas, land. Buyer to assume payment of taxes and commissions. Make papers and cash to Citizens' Bank, Spencerville, Ohio."

It appears that G. W. Michael was carrying on negotiations for the sale of a body of land to one Altman. Part of this land belonged to Mr. Michael himself, part of it to others. In the course of negotiations between Altman and Mr. Michael, the purchase

of this Kennedy land came up, with the result that Mr. Michael sold the Kennedy land to Altman for \$4400, it being the intention between Kennedy and Altman, apparently, that the \$400 was to cover Michael's commission on the sale. The consideration stated in the deed which Kennedy executed was \$4400 and on delivery of that deed he received that amount in payment, part of it apparently being in notes, part of it in cash. Mr. Michael testified that he had not advised Kennedy of his arrangement with Altman, although instead of selling the land to Altman, who appears to have resided in Jonesboro, for \$4000, he was really selling it to him for \$4400. He did not advise Kennedy of this fact.

There is not a word of testimony in the case that Michael was acting for his firm in the matter. He speaks of himself all through and as will be seen, the correspondence between himself and Kennedy was entirely in his own name although on the letterhead of his firm. The only evidence introduced on the part of appellant was the letter from G. W. Michael to Kennedy, plaintiffs having introduced the telegram above referred to from Kennedy to Mr. George W. Michael. This was substantially all the evidence in the case.

It is impossible to sustain the judgment of the learned trial court.

In the first place the petition alleges a contract between plaintiffs as partners and Kennedy. There is an absolute failure to show any such contract with the partners. The only contract entered into as far as shown by the evidence is the individual contract of George W. Michael with Kennedy. Possibly George W. Michael was acting for his firm, but there is no proof that that is the fact.

In the second place, the contract that the petition counts on is a specific contract to the effect that plaintiffs, that is George W. Michael and Morris D. Michael,

were to have any sum realized on the sale over and above \$4000. There is not the slightest proof of any such contract ever having been entered into between the parties. The only contract or agreement in evidence is that contained in the letter and telegram set out, and these cannot be construed into any such contract.

It is impossible, with a petition of this kind, for the plaintiffs now to claim a right to recover as for money had and received, as is now claimed in support of the judgment. It was long ago settled in this state, in accordance with the general rule recognized by all courts, that where a plaintiff sues on a special contract he must recover upon the contract alleged or not at all. This, says our Supreme Court, is the rule although the evidence develops a cause of action for money had and received, or even on *quantum meruit* for work and labor done and services performed. [See *Cole v. Armour*, 154 Mo. 333, 55 S. W. 476, and cases there cited.]

Counsel for respondents refer us to no authority whatever in support of the judgment, nor of the position which they take before us, that the action is not based upon a contract but merely on a recital of the agreement between the parties. We are unable to distinguish the difference between a contract and an agreement. Whether plaintiffs elect to call this a contract or an agreement, in either event they have sued on a special contract or a special agreement, which they have set out with particularity and which they have utterly failed to sustain, either as a contract between Michael & Son, as partners, or George W. Michael as an individual on the one side and R. R. Kennedy on the other.

The judgment of the circuit court is reversed. *Nortoni* and *Caulfield*, JJ., concur.

RUDOLPH WALTHER, Respondent, v. CITY OF
CAPE GIRARDEAU et al., Appellants.

St. Louis Court of Appeals. Argued and Submitted June 5, 1912.

Opinion Filed July 2, 1912.

1. **WATERS AND WATERCOURSES: Surface Water: "Dominant Estate" Defined.** A "dominant estate" is property which is situated above or higher than that of a lower, or subservient, estate.
2. ———: ———: **Dominant Estate: Judicial Protection: Municipal Corporations.** While a private owner of a dominant estate is entitled to judicial protection of his land from illegal acts of the owner of the subservient estate in stopping the flowage of water, a city or other public body, not the owner of a dominant estate, has no right to judicial protection of a claim to the flowage of water, not constituting a public or navigable stream.
3. **WATER AND WATERCOURSES: What Constitutes "Water-course."** A drain across a lot did not constitute a "water-course," in a legal sense, where all the water that passed through it was surface water or was led to it through a sewer drain.
4. ———: **Surface Water: Common Law Rule.** The common law rule, that surface water, being a common enemy, every one has a right to protect himself against its flow over or upon his land, prevails in this state.
5. **MUNICIPAL CORPORATIONS: Nuisances: Manner of Abatement.** While municipalities may declare what constitutes a nuisance and may summarily abate the same, such abatement must be done in a lawful manner, and is subject to determination by the courts, both as to the fact of nuisance and as to the manner in which the abatement is carried out; and the power to abate does not carry with it the power to destroy, unless the thing abated be a nuisance *per se* and of a public character.
6. ———: ———: ———. If a nuisance on private property can be abated in any other way than by forcibly taking possession of the property, it is the duty of a city, undertaking to abate the nuisance, to do so.
7. **INJUNCTIONS: Mandatory Injunction: Municipal Corporations: Compelling Undoing of Illegal Acts.** A mandatory injunction lies to compel a city to restore a lot to its former con-

dition, after having improperly taken forcible possession of the same and constructed a sewer drain through it, over the owner's protest and in the face of notice that proceedings would be taken as promptly as possible to enjoin such action.

8. ———: ———: ———: ———: **Adequate Remedy at Law.** Where a city wrongfully constructed a drain across plaintiff's lot, over his protest and in the face of notice that proceedings would be taken as soon as possible to enjoin such construction, his right to a mandatory injunction to compel restoration of the lot to its former condition could not be defeated on the theory that he had an adequate remedy in an action for damages.
9. **MUNICIPAL CORPORATIONS: Trespass of Agents: Individual Liability.** The agents of a municipal corporation who, without authority of law, enter upon land and lay a drain over it, commit a trespass and lay themselves liable to the owner for damages, compensatory and penal.
10. ———: **Nuisances: Manner of Abatement: Sewers: Eminent Domain.** A municipal corporation has no right to summarily take possession of a strip of land for the purpose of constructing a drain across it and thereby abate a nuisance located on other land; but it has the power to obtain land by condemnation, for the construction of sewers.
11. ———: ———: **Right to Abate: Question of Fact.** The question as to the right of a city to abate a thing claimed to be a nuisance is one of law and not of fact.
12. **EQUITY: Jury: Trial by Jury.** In an equity case, it is optional with the trial court to take the opinion of a jury on a question of fact.
13. **INJUNCTIONS: Mandatory Injunction: Municipal Corporations: Compelling Undoing of Illegal Act: Right of Trial by Jury.** While, in an action at law, an issue as to the existence of a nuisance is properly submitted to a jury as one of fact, it was not improper, in a proceeding for a mandatory injunction to compel a city to restore a lot to the condition in which it was before the city took forcible possession of it and constructed a drain across it, to refuse to submit to a jury issues as to whether plaintiff was liable for the maintenance of a nuisance and whether defendant had a right to abate it as it undertook to do.
14. **MUNICIPAL CORPORATIONS: Abating Nuisance: Wrongful Act: Reimbursement for Expenses.** A city is not entitled to recover against a property owner the cost of constructing a drain across his lot, where, in taking possession of the lot and in constructing the drain, it committed a trespass.

15. **APPELLATE PRACTICE: Mandatory Injunction: Expiration of Time for Performing Act Pending Appeal: Form of Decree.** In an action for a mandatory injunction, where a decree was rendered for plaintiff, and the time for doing the thing that defendant was required by the decree to do expired while the case was pending on appeal, the appellate court, on affirming the judgment, will remand the case to the trial court with directions to re-enter the decree and therein require defendant to do the things required to be done by him within a certain time thereafter.

Appeal from Cape Girardeau Court of Common Pleas.

—*Hon. R. G. Ranney*, Judge.

AFFIRMED AND REMANDED (*with directions*).

Frank Kelly and Ely, Kelso & Miller for individual appellants; *Lane & Alexander* for the appellant city.

(1) Cape Girardeau is a city of the third class. The city not only has the right to abate nuisances within the city but it is its duty to do so. It is one of the police powers of the city, and may be exercised in a summary manner. Secs. 9231, 9235, 9574, R. S. 1909; McQuillian Municipal Ordinances, sec. 444; 29 Cyc. pp. 1214-1218; *Chillicothe v. Bryan*, 103 Mo. App. 409; *Waggoner v. South Gorin*, 88 Mo. App. 25; *Gallaso v. Sikeston*, 124 Mo. App. 380; *Realty Co. v. Crockett*, 158 Mo. App. 573, 138 S. W. 924; *St. Louis v. Schmekelberg*, 7 Mo. App. 556. Section 339 of the ordinance declared the pond a nuisance, and section 351 of the ordinance provided for the abatement thereof, and the notice was given and plaintiff ignored it, and the marshal had the right to abate it. *Realty Co. v. Crockett*, supra. (2) The plaintiff had no right to stop up the drain and cause a pond to be formed on the adjacent lots to the injury of the owners and to the damages and injury of the public. *Goettenetroeter v. Kappleman*, 83 Mo. App. 290; *Paddock v. Somes*, 102 Mo. 226. (3) The court erred in refusing to call a jury to pass upon the question of the pond being a nuisance and the right of the city to abate it. *Cooley's Blackstone*, pp. 219, 220;

Manufacturing Co. v. Milling Co., 79 Mo. App. 153; Grossman v. Oakland, 36 L. R. A. 593; Waggoner v. South Gorin, 88 Mo. App. 25; Lipscomb v. Little John-b0 S. E. 1023. (4) The plaintiff has an adequate remedy at law in an action for damages and a bill in equity will not lie. Burgess v. Kattleman, 41 Mo. 480; Weigel v. Walsh, 45 Mo. 560; Graden v. Parkville, 114 Mo. App. 527; Gordon v. Mansfield, 84 Mo. App. 367; Crenshaw v. Cook, 65 Mo. App. 264; Strother v. Cooperation Co., 116 Mo. App. 518. (5) An injunction will not lie for past injuries, or when the act complained of is complete. Owen v. Ford, 49 Mo. 436; Carlin v. Wolf, 154 Mo. 539; Davis v. Hartwig, 195 Mo. 398; Brier v. Bank, 225 Mo. 683; 22 Cyc. 759. (6) He who comes into equity must come with clean hands. Equity would have compelled plaintiff to put in a drain or restrained him from holding the water in a pond and creating a nuisance, therefore it will not restrain defendant from doing the very thing which it would require him to do himself. Heitz v. St. Louis, 110 Mo. 626; Little v. Cunningham, 116 Mo. App. 545; 16 Cyc. 144. Plaintiff maintaining a public nuisance cannot have the aid of equity to restrain defendant from abating it, although defendant has no authority to abate it. Railroad v. Crothersville, 159 Ind. 330, 64 N. E. 914; Eaton on Equity, sec. 20, page 69. (7) Equity will not grant a mandatory injunction unless the consequent damages cannot be estimated or compensated. Bank v. Kennett Est., 101 Mo. App. 389; Sec. 2534, R. S. 1909. (8) Plaintiff's bill should have been dismissed and defendant awarded judgment for the sum of ninety dollars and thirty-four cents for the cost of the work. Hannibal v. Richards, 82 Mo. 330; Sec. 9574, R. S. 1909.

Wilson & Cramer for respondent.

(1) The depression in the block in which plaintiff's property is situated is not a watercourse in the well defined legal meaning of that term, but simply

a natural drain for surface water. *Scott v. Railroad*, 158 Mo. App. 625. (2) Under the common law rule, which prevails in this state, that surface water is a common enemy, plaintiff had the right to protect himself against the water flowing through the depression in his lot by filling it up, even though the effect was to hold the water on his neighbor's land. *Grant v. Railroad*, 149 Mo. App. 306. Having this legal right, he was not answerable in damages to the adjoining owner, nor amenable to the provisions of the city ordinances for creating a nuisance. The pond if it was a nuisance, was not on plaintiff's premises, and he was under no obligation to leave an outlet for the water when improving his lot. (3) The evidence shows that the city discharges water collected in Themis and other streets into the depression west of Sprigg street through a sewer extending under Themis street for some distance into the alley, and that this water runs through the opening under Sprigg street onto the lots west of plaintiff's premises. No obligation rested upon the plaintiff to furnish the city a passage for the surface water it thus collected and threw upon those lots. The alleged nuisance could easily have been abated by closing the city's sewers, or filling up the lots west of plaintiff without invading his constitutional rights. (4) The sewer built across plaintiff's premises is a permanent structure of large-sized pipe, connected with cement, and the act of the city amounts to a high-handed taking of his property in violation of section 21 of the bill of rights which provides: "That private property shall not be taken or damaged for public use without just compensation." (5) The sewer is a continuing nuisance which interferes with plaintiff's free use of his property and should be abated at the cost of the city. It would be unjust to require plaintiff to undo at his own expense what it took ten men three days to do in putting down the sewer. Plaintiff was entitled to a mandatory injunc-

tion to compel the city to remove the sewer and restore his lot to its former condition. Wood on Nuisances, sec. 786; Atterbury v. West, 139 Mo. App. 180; Bank v. Kennett, 101 Mo. App. 370.

REYNOLDS, P. J.—In March, 1910, the city of Cape Girardeau, a city of the third class, cut a ditch ninety feet in length, width not given, but apparently about three feet, through and across a lot owned by plaintiff fronting on Frederick street in that city and constructed a permanent sewer therein partly of twenty-four inch and partly of eighteen inch pipe, connecting the same with a thirty inch sewer pipe which the city had before then laid under Frederick street when it filled up that street. The city had no permission or authority from plaintiff to cut through his lot and lay this pipe but claimed the right to do so under its authority to abate a nuisance. The nuisance complained of is claimed to have been created by plaintiff filling his lot up to the grade of Frederick street and thereby stopping the flow of water from low ground to the west of his premises and from the lands of others through plaintiff's lot and thence into the sewer pipe which had been laid by the city under Frederick street. Preliminary to cutting the ditch through plaintiff's property and laying the sewer pipe in it, the city caused a notice to be served upon the plaintiff that the stopping and filling of the drain and sewer pipe on Frederick street by him, adjacent to and in front of his lot had caused the water to accumulate in the "ditch, drain, depression and watercourse" above where plaintiff had stopped and filled the sewer pipe and drain and had caused water to stand in that place to a depth of three or four feet, covering an area of about 1000 square yards, forming a pond of "stagnant, filthy, obnoxious water and giving rise to obnoxious and offensive and disagreeable odors, and is now, and will grow worse as the weather gets warmer, a public nuisance, endangering the public health,

and is a source of disease, to the great danger, damage, injury and annoyance of the public." Plaintiff was therefore notified that acting under the order of the acting mayor and in accordance with the provisions of the ordinance of the city, he was notified by the chief of police to open the drain and sewer pipe closed by him or cause it to be opened within twenty-four hours of the service of this notice or to signify his willingness that the city officers might enter on his premises and make the proper opening and drain to remove the water and so abate the nuisance. Plaintiff was further notified that if he failed or refused to comply with the demand and request the chief of police would take the necessary steps to drain the pond or pool and abate the nuisance by making an opening through plaintiff's lot and laying a drain pipe to connect with the one closed by him. This notice was served on the plaintiff on the 23rd of March. It appears by the testimony that on receipt of this notice plaintiff told some one of the officers of the city that he wanted a little time to consult his attorney about the matter and he thereupon telephoned to his attorney, who resided at Jackson in Cape Girardeau county, who told him that he would come down and examine into the matter in a day or two. At the expiration of the twenty-four hours, however, plaintiff not having taken steps to remove the obstruction by cutting a ditch through his premises and not having signified his willingness or given permission to the city to do so, the officers of the city, over the protest of plaintiff, entered upon his lot on Friday, the 25th of March, preliminary to doing the work of cutting the ditch through his premises. On Saturday, the 26th, plaintiff caused a notice to be served upon the mayor of the city that on Monday, at 2 o'clock p. m., he would present his application to the judge of the Cape Girardeau Court of Common Pleas in chambers, asking for a restraining order against the city. Without paying

attention to this notice, the officers of the city on that Saturday, the 26th, commenced cutting the ditch clear across plaintiff's lot, a ditch some seven feet in depth at Frederick street and a foot or so deep at its western end, and with a force of from seven, eight or nine men, possibly more, kept up the work all during Saturday and until late Saturday night and all through Sunday until late that night and on Monday morning completed the work by laying the sewer pipe through the whole width of plaintiff's lot, cementing its joints and then filling up the trench. The petition for the writ was filed with the court named on the 26th, but the work having then been finished, the cause went over to the November, 1910, term of the court. At that term defendants answered, the city in its separate answer justifying on the ground that the filling up of the lot by plaintiff in the manner filled by him was a nuisance in that it obstructed the flow of the water from the low ground to the west of him, it being set up in the answer that there was a natural watercourse and that the water in this pond or low land west of plaintiff was formed in part from springs and in part from waters falling from the heavens as also in part from water which flowed into it from a drain under the fill of the street next west of Frederick street. The individual defendants answered separately with general denials, two of the defendants however also pleading that while they were members of the city council at the time the alleged acts were committed, their terms had since expired and they were no longer officers of the city. On the hearing of the cause the court entered up an order sustaining plaintiff's petition and ordered the city to remove the sewer pipe and fill up the ditch on or before the 10th of February, 1911, and thereafter refrain from entering upon the lot of plaintiff and digging any ditch or trench or constructing any sewer pipe through it. From this defendants, filing their motion for a new trial and saving exceptions

to that being overruled, have duly perfected their appeal to this court.

It is argued by the learned counsel for appellants that plaintiff had no right to stop up the drain and cause a pond to be formed on the adjacent lots to the injury of the owners and to the damage and injury of the public. They introduced much testimony in an endeavor to prove that the pond spoken of was formed in part by springs and that a ravine, which they claimed was a natural watercourse, led from that through the property of plaintiff and into the sewer under and across Frederick street and claimed that plaintiff, as the owner of the subservient or lower lot, had no right to interfere with the natural flow of the water.

It is entirely unnecessary to consider this phase of the case. While the private owners of what is referred to by the courts and text-writers as the dominant estate, that is property situated above or higher than that of the lower or subservient estate, have an undoubted right to apply to the courts for the protection of their land from what may be claimed to be illegal acts of the owner of the subservient estate in stopping the flowage of water, we know of no case and have been cited to none where a city or other public body, not the owner of the dominant estate, has any right to appeal to the courts for the protection of any claim to the flowage of water, that water not being a public or navigable stream. This is so whether the doctrine of the civil law or of the common law is to be applied. In our state, as was definitely determined in *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 271, the common law rule as to the stoppage of surface water prevails.

Before dismissing this phase of the case from consideration, it is not out of place to remark that the overwhelming weight of the testimony establishes the fact that there has never been a watercourse, in

the legal meaning of that term, through the property of plaintiff. All the water which it is claimed that he prevented flowing through his lot was surface water, water falling either from the clouds or led into the pond through a sewer pipe that the city had itself laid into this low ground and under the street and an alley to the west of it. There is no substantial evidence that natural springs supplied the water. It was not a watercourse through plaintiff's property. [Gray v. Schriber, 58 Mo. App. 173, l. c. 178, and cases there cited.] Hence this water was surface water, and applying the doctrine of the common law, surface water being a common enemy, every owner has a right to protect himself against its flow over or upon his land. It cannot be said that when he does this that his act is either unlawful or that he is responsible for the effect of preventing the overflow on his land of this surface water. [Jones v. Wabash, St. L. & Pac. Ry. Co., 18 Mo. App. 251, l. c. 257, approved Webb v. Carter, 121 Mo. App. 147, l. c. 153, 98 S. W. 776.]

The nuisance complained of is not on the land of this plaintiff but it is on private property of adjoining owners. If it could be held that because the owner of the lower estate, in protecting his own property against surface water, is liable in damages as for a nuisance because of the stoppage of the flow of surface water over his property, then the whole doctrine upon which the right of stoppage of surface water is based would be overthrown.

In illustration of the law as applicable to the right of stoppage of surface water, it is sufficient to refer to Abbott v. Kansas City, St. J. & C. B. R. Co., *supra*, and cases there cited and those which have followed that case in our state. Referring to decisions of other jurisdictions the matter will be found very fully and ably treated in Hoyt v. City of Hudson, 27 Wis. 656; O'Connor v. Fond du Lac, Amboy & Peoria Ry. Co., 52 Wis. 526; Gibbs v. Williams, 25 Kan. 214.

See also 1 Wood on Nuisances (3 Ed.), pp. 494, 517, sections 378, 385.

But it is urged that the power of the city to declare a nuisance and the right to abate it by summary process is granted by statute as well as provided for by ordinance; that the courts cannot interfere. While it is true that the municipalities of this state have a right to declare what constitutes a nuisance and to abate nuisances even in a summary manner, it does not follow that in doing this they are above the law; they must abate a nuisance in a lawful manner, and always subject to determination by the courts, both as to the fact of nuisance and as to the manner of abatement. The power to abate does not carry with it the power to destroy (*Waggoner v. City of South Gorin*, 88 Mo. App. 25, l. c. 34, and authorities there cited), unless it be a nuisance *per se* and of a public character. [*Sullivan Realty & Improvement Co. v. Crockett*, 158 Mo. App. 573, 138 S. W. 924.]

Judge DILLON announces as the law, that when the governing body of a municipality has conferred upon it the power to do an act, the power conferred in general terms without any prescribed mode of exercising it, that it necessarily has to a greater or less extent a discretion as to the manner in which the power shall be used, which cannot be judicially interfered with, but that this discretion is subject to judicial control when the power is exceeded "or there is a manifest invasion of private rights." [I Dillon on Corporations (5 Ed.), sec. 242.] "So," says Judge DILLON, *ibid.*, sec. 243, "where it is made the duty of the city to remove, as far as they may be able, every nuisance which may endanger health, the courts, unless the power be transcended, cannot ordinarily interfere to control the manner in which this shall be done. But the power to abate nuisances, like all other municipal powers, must be reasonably exercised; and although the power be given to be exercised in any man-

ner the corporate authorities may deem expedient, it is not an unlimited power, and such means only are intended as are reasonably necessary for the public good; wanton or unnecessary injury to private property and private rights are not thereby authorized."

In the case at bar the city authorities, without giving plaintiff any chance to be heard, proceeded to condemn the fill, which plaintiff had lawfully made on his own land, as a nuisance, although the water which was the real nuisance was on the land of another; and without having instituted and maintained any condemnation proceedings whatever for the taking of the plaintiff's property for the location of a sewer through his lots, and without his permission but in spite of his protest, entered upon his land by force and with a high hand, as the law construes the acts here done by these defendants, and committed a trespass upon his property. They did this with such expedition and with such force that before plaintiff had an opportunity to have the courts act, the acts of cutting the ditch, laying the pipe and filling up the excavation were completed. We are not to be understood as holding that there may not be extreme cases in which it is the right and duty of the municipal authorities to act promptly and in a summary manner. But this was not such a case. There was no necessity for haste and it is not clear that the city could not have abated the nuisance which the presence of the pond created, that nuisance, as the evidence shows, largely created by the inflow of water from the sewer under the street to the west of plaintiff's property. If the city could have abated the nuisance of the pond in other ways than forcibly taking possession of plaintiff's lot, it was its duty to do so. [*Waggoner v. City of South Gorin*, *supra*; *Babcock v. City of Buffalo*, 56 N. Y. 268.]

The right of the court to interfere here by mandatory injunction is challenged, the acts having been

completed before the court could hear and determine upon them.

The right of the courts to issue mandatory injunctions has been recognized by our courts in many cases. We had occasion recently to pass on this matter ourselves and to cite some of the cases in which that right had been recognized. [See *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159.] We had in *St. Louis Safe Deposit & Savings Bank v. Kennett's Estate*, 101 Mo. App. 370, 74 S. W. 474, a case in which a mandatory injunction was issued by the trial court and its action fully sustained by our court, an example of a completed structure ordered to be removed after its completion. In that case Judge GOODE, who wrote the opinion, has gone into the authorities so fully, that to undertake to discuss this branch of the case would be a work of supererogation.

In *Planet Property & Financial Co. v. St. Louis, O. H. & C. Ry. Co.*, 115 Mo. 613, 22 S. W. 616, a mandatory injunction was sought to undo the acts of the railroad company in digging a cut through certain property and to restore the road through which the cut was made to its former condition. The injunction was refused solely on the ground that plaintiff had failed to aver in its petition that it had objected and notified the defendant of its objection while the road was being built.

In the case at bar there was not only no acquiescence or consent but there was determined and positive objection, followed by an appeal to the court, of which appeal defendant was duly notified before it had completed the acts sought to be enjoined.

Treating of interlocutory injunctions, Mr. High says (4 Ed., vol. 1, p. 10, sec. 5a), that since the object of a preliminary injunction is to preserve the *status quo*, the court will not grant such an order where its effect would be to change the *status* and that by the

"*status quo*" which will be preserved by preliminary injunction "is meant the last actual, peaceable, non-contested condition which preceded the pending controversy, and equity will not permit a wrongdoer to shelter himself behind a suddenly and secretly changed *status*, although he succeeded in making the change before the hand of the chancellor has actually reached him. And where, before the granting of the injunction, the defendant has thus changed the condition of things, the court may not only restrain further action by him, but may also, by preliminary mandatory injunction, compel him to restore the subject-matter of the suit to its former condition." It is true that the author is here treating of a preliminary order of injunction, but we know of no reason why the same rule should not apply to an injunction on final hearing.

Applying it to the facts in the case at bar, it appears that this plaintiff, in a peaceable and orderly manner, and in a lawful effort to protect his rights, denied that he was responsible for the maintenance of the alleged nuisance, and notified the city authorities not to enter upon his lot for the purpose of digging it up and laying the proposed sewer through it. Having reason to believe that in the face of this notice the city authorities proposed to go on with their threatened trespass on Saturday, plaintiff caused written notice to be served upon the proper officer of the defendant municipality, that on the following Monday he would apply to the judge of a court having jurisdiction in the premises for a temporary injunction restraining them from commencing the threatened work and on final hearing for an injunction perpetually enjoining them from entering on his premises and carrying out the work. Upon the receipt of this notice the municipality, that municipality itself a creature of the law and its officers the servants of the people, charged above all others with the execution

and proper observance of the law, on the very day of the service of this notice, with a high hand and by force, says the law, designating such acts *vi et armis*, these officers entered upon the premises of plaintiff, put a large body of men at work digging a trench ninety feet long and some three feet or more wide through the whole length of the lot of this plaintiff, in direct violation of the law of the land which prohibited the doing of any but necessary work on the Sabbath day, continued this work on through that day and through the forenoon of Monday, so that when at the hour designated on Monday, that is to say 2 o'clock, the petition in this case was presented to the honorable judge of the court of common pleas, the work of digging the ditch, laying the sewer pipe in it and through the whole length of plaintiff's lot, and filling up the ground, was completed. Having completed the trespass these defendants now say: "You cannot make us undo what we have done—sue us at law for damages." If individuals, or municipalities, by such high-handed proceedings, tending to a breach of the peace, and in flagrant disrespect of the courts and in an attempt to thwart their jurisdiction, can, in this manner, evade the power of the chancellor and put the process of law and the orderly proceedings of the court at defiance in an attempt to render any action the court may take abortive, we have a government of force and not of law. Much more is this course to be deprecated and condemned when the instigators, promoters and executors of it are themselves officers of the law and representatives of one of the most important municipalities of the state.

We therefore hold that it was within the power of the trial court to issue the mandatory injunction in this case compelling the undoing of what had been done, especially so when in all good conscience and by the usual course of procedure that court had been ap-

pealed to to exercise its chancery powers in the premises.

In an endeavor to drive the plaintiff from the court in this case, defendants not only assert that the action came too late and that the powers of a court of chancery, through a mandatory injunction, cannot be invoked to undo what they had done, but they claim that plaintiff has an adequate remedy at law in an action for damages.

Mr. High, in his standard work on Injunctions (4 Ed., vol. 1, p. 686, sec. 722b), says that an examination of the later authorities upon the subject of injunctions against trespass "discloses a decided tendency to adopt the adequacy or inadequacy of the legal remedy as the sole and ultimate test as to the right to equitable relief in such cases, and it will be seen that the question of irreparable injury is of importance only in so far as it bears upon this fundamental question of the legal remedy. While courts have, perhaps, never in express terms laid this down as the sole criterion, it will be seen that injunctive relief is freely granted regardless of the irreparable character of the injury inflicted, where it appears for any reason that full and complete redress may not be had in a court of law. Such considerations as those of a multiplicity of suits, the continuing nature of the trespass, the insolvency of the defendant, numerous acts where the damages for a single one would be insignificant, and the difficulty of proving or measuring the damages, all of which concern the remedy and not the wrong, and all of which have come to be of such controlling force, show beyond question that it is not so much the nature or kind of the wrong complained of as it is the relative efficiency of the legal as compared with the equitable remedy, which furnishes the fundamental, governing rule by which courts of equity are guided in administering preventive relief against the commission of a trespass."

In line with this we have the authority of Judge DILLON, where, in chapter 31, sections 1570, 1572, supra, he says that while courts of equity do not, as a rule, interfere to prevent municipal authorities from transcending or making a wrongful use of their powers, they will, in a proper case relieve against their unlawful or wrongful acts. "But," says Judge DILLON, section 1573, "since municipal corporations are invested with large powers to enable them to execute specific objects, or to promote the welfare of the people who are subjected to their rule; and since experience shows how frequently their officers abuse or transcend their rightful authority to the detriment or injury of the inhabitants, and how necessary it is that the latter should have easy and effectual remedies to restrain or correct municipal excesses of power; and perhaps because in the code states the ancient line of separation between law and equity is not so distinctly maintained as formerly, the general tendency of the later cases is to favor a relaxation rather than a strict application of the rule . . . which denies the right to resort to equity if there exists an adequate remedy at law."

Applying these rules to the facts here, it is not clear that plaintiff has a certain and adequate remedy at law. Furthermore, it is apparent that the presence of this sewer pipe in plaintiff's lot is a continuing damage and nuisance. Plaintiff testified that this sewer in his lot would forever prevent him from improving the lot by the erection of a building upon it; that any building erected would have this sewer running through it in such a manner as to seriously interfere with the erection of a building. That seems to be clear, for while at the front of the lot the trench is some seven feet deep and the twenty-four inch sewer pipe is laid on the bottom of it at that point, as the trench and the pipe run to the west of the lot, the pipe is brought nearer the surface; for it appears

that the trench grows more shallow toward the west and the pipe is brought out at the west end of the lot but a few inches below the surface of the lot. In other words, the fill in front necessary to bring the lot up to the level of the street is much more than in the rear. It is true that damage on the basis that plaintiff is entirely deprived of the use of this strip through his lot might be estimated, so possibly could its decrease in value by its being split through or divided by the presence of this sewer. But it can hardly be said that these damages are an adequate compensation to a man, when the whole purpose and object of his acquisition of property is to improve it by the construction of a building. That object is practically annulled. In such a case, an action for damages might be sustained for the trespass, but we cannot say that it affords an adequate remedy. The presence of this sewer invites recurrent trespass. If its presence is recognized in and through plaintiff's property as lawful, the city authorities, almost from necessity, must have access to it to make repairs in case of any stoppage of the flow of water through it, or of any break in the sewer pipe.

Mr. High, *supra*, section 698, says that the rule of denying relief in equity has been relaxed in strong cases of irreparable injury as where the trespass will result in the destruction of the substance or chief value of the estate. In such cases the legal remedy would be entirely inadequate to afford redress and equity will restrain the trespasses, basing the relief in such cases upon the utter inadequacy of the remedy at law.

Here the act complained of, the trespass, was committed under and by authority of the city and by its officers. A serious question would surely arise, in an action against the city for damages, as to whether the city, the principal defendant in this case, could be held liable in damages for the unlawful acts of its

agents. While it is true that the agents of the corporation, committing an act *ultra vires* the corporation, that act a trespass, would be individually liable in an action at law for damages occasioned by their act, even for punitive damages, it is a question which we do not now decide but which we hold at least doubtful, as to whether the municipal corporation itself could be held liable.

The act of the city in this case was a naked trespass, committed not only without sanction of law, but in violation both of the mandates of the Constitution and of statutory enactments. In a way the facts here are as in *Commonwealth v. Pittsburg & Connellsville Railroad Co.*, 24 Pa. St. 159. There the defendant, a railroad corporation, was partially filling up one of the locks at the outlet of the Pennsylvania state canal at Pittsburg and casting an arch over it in such a manner as to entirely obstruct the use of it. The Commonwealth prayed for an injunction to prevent this. The defendant admitted that it was doing these acts in the construction of its road and urged as an excuse that the portion of the canal had never been of any valuable use to the state and that for many years it had lain in utter abandonment and desolation. Such, it is stated, seemed to be the fact. Mr. Justice LOWRIE, delivering the opinion of the court, commences in this vigorous language: "The boldness of this act seems almost like a studied test of the vigilance of the canal commissioners, and of the efficiency of the remedies which the state has provided for the prevention of injuries. It is hoped that the equity remedy, being somewhat unusual and peremptory in its character, will not be applied to an act which does so little real injury." Disposing of this hope by the citation of a number of cases in which, even by common law writs, the strong arm of the law has intervened between the law-breaker and the citizen, Judge LOWRIE holds the acts of the character present justify

the use of the exercise of the powers of a court of chancery through injunction, that being conducive to social order as furnishing an equivalent judicial remedy. It is to be noted that this decision was rendered in the year 1855, and before injunction as a preventive remedy had come into the common uses to which modern circumstances and conditions have given rise. Continuing, Judge LOWRIE says: "The argument that there is no 'irreparable damage,' would not be so often used by wrong-doers, if they would take the trouble to observe that the word 'irreparable' is a very unhappily chosen one, used in expressing the rules that the injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimable only by conjecture and not by any accurate standard. . . . As this argument is generally presented, it seems to be supposed that injunctions can apply only to very great injuries; and it would follow that he who has not much property to be injured, cannot have this protection for the little he has. Besides this, where the right invaded is secured by statute or by contract, there is generally no question of the amount of damage, but simply of the right. He who grants a right cannot take it away, even on giving a better, without a new agreement for the purpose. . . . And when railway companies or individuals exceed their statutory powers in dealing with other people's property, no question of damage is raised when an injunction is applied for; but simply one of the invasion of a right. . . . And railway companies will not be allowed to exercise their discretion capriciously; with the immense powers that are freely and loosely given to them, this much restraint is essential to the protection of private rights. . . . If they step one inch beyond their chartered privileges to the prejudice of others or of the stockholders, or offer to do any act without the prescribed preliminary steps, they are lia-

ble to be enjoined irrespective of the amount of damage. They shall not take soil or land without payment or security: . . . and the dissent of one out of many tenants in common of land or easement will stay their hand until compensation be made. . . . Damage or no damage to others, they must obey their charter, and that was our decision in the late case of *Manderson v. Commercial Bank* (28 Pa. St. 379). . . . In the light of these principles the question before us is very easily decided. The matter complained of is an invasion of a public highway, and it must be enjoined against."

We have quoted from this case at some length because the principle it illustrates is applicable to the facts in the case at bar. It is true that that case presented one where the rights of the public were involved as against a railway corporation, itself a quasi public corporation, engaged in a public work, but the limitations upon the charters of railroads are no more stringent than the limitations in our state by statute upon the rights and privileges of municipal corporations. When they go outside of those rights, their acts are void and their agents committing them are trespassers. Nor are the rights of the individual less within the protection of the law than are those of the state. We feel safe, following this decision of the Supreme Court of Pennsylvania, in holding that when this municipal corporation went beyond its charter privileges to the prejudice of plaintiff and undertook to take possession of his property without the preliminary steps prescribed by our Constitution and statutes, it and its co-defendants are liable to be enjoined from further trespass and a court of equity has power to cause them to undo what they have illegally done, irrespective of the amount of damage.

In the case referred to above, the statute of the state of Pennsylvania was cited on the proposition that railway corporations shall not take soil or land

without payment or security. In our state that matter is controlled, not merely by statute but by mandatory constitutional provisions. Thus our Bill of Rights, section 21, article 2, of our Constitution, in unmistakable terms forbids the taking or damaging of private property for public use without just compensation. That section further provides: "Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested." Construing this section of our Constitution, and the statutes carrying it into effect, our Supreme Court has said in many cases that when this right of eminent domain is exercised, it must be exercised within and confined to the letter of the statute conferring the power. [See *Thurston v. City of St. Joseph*, 51 Mo. 510; *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 235, 73 S. W. 496; *Clemens v. Connecticut Mut. Life Ins. Co.*, 184 Mo. 46, 82 S. W. 1.] As before said, while treating of the abatement of a nuisance, the power to abate nuisances is conferred on the municipalities of this state, but there is no implied right to exercise that power in an unlawful manner. This municipal corporation has the undoubted right to declare a nuisance and to abate it. But its act in declaring a thing a nuisance is subject to review by the courts. [*Waggoner v. City of South Gorin*, *supra*; *Babcock v. City of Buffalo*, *supra*.] It has no right, as we have seen, in the abatement of a nuisance on the property of one to enter upon the land of another and take possession of a long strip through the land of that other even for the purpose of abating a nuisance, especially when that nuisance is not on the lands of that other. The right of the municipality to condemn the land of this plaintiff for

the construction of a sewer is undoubted, but the mode and manner of doing this and the guarantees thrown around the landowner when it is done, are provided by our statutes as well as by our Constitution. None of the forms required by statute were here observed. The rights guaranteed by the Constitution were entirely disregarded. If we are to remit this plaintiff here to his action for damages, even conceding that damage adequate to the injury could be awarded, we would, by indirection, sanction these unwarranted acts.

Learned counsel for appellants argue that the trial court erred "in refusing to call a jury to pass upon the question of the pond being a nuisance and the right of the city to abate it." There are two propositions here. That which asserts that the right of the city to abate the alleged nuisance is a jury question, is incorrect. That is a question of law. There are two answers to the first proposition: First, this was a proceeding in equity and it is optional with the trial court to take the opinion of a jury on a question of fact; second, it is true that when the issue is nuisance or no nuisance, it is proper, in an action at law, to submit that as one of fact to the jury. But that is not the issue here, even if we concede that the pond was a nuisance. The questions here involved are, is plaintiff liable for its maintenance, and had defendants the right to abate it, as they undertook to do, by entering upon the land of plaintiff in the manner here done.

It is argued that the petition of plaintiff should have been dismissed and judgment awarded defendant city for the cost of laying the sewer. In the view we take of the case it is obvious that the city cannot recover for this work. It was not only a volunteer in doing it, but a trespasser. This is not a case where in the cost of public improvements can be assessed against the property of those benefited, nor is it one

falling within the ordinances of the city, for as we hold, the work was not done in a lawful manner.

There is some evidence warranting the trial judge in finding that all the individuals, as officers of the city, assented to the acts done. We will not disturb his finding on that.

The judgment of the circuit court granting the injunction and making it mandatory is affirmed. Inasmuch, however, as the time within which the wrong was to be undone has expired, we remand this case with directions to the court of common pleas of Cape Girardeau to re-enter its decree as heretofore entered, but fixing the time within which the acts commanded are to be done within sixty days from the date of the rendition of the amended decree. This also lodges the enforcement of the decree within the power of that court. Costs of the cause and of the appeal are adjudged against the appellants. *Nortoni, J.*, concurs, *Caulfield, J.*, in the result.

KATE LOGAN, Respondent, v. UNITED RAILWAYS COMPANY OF ST. LOUIS, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 3, 1912.
Opinion Filed May 7, 1912. Motion for Rehearing
Overruled and Opinion Modified and
Refiled July 2, 1912.

1. **RELEASES: Rescission: Pleading.** A release which was fraudulently or wrongfully procured from the plaintiff may be attacked by the reply, as provided by section 1812, Revised Statutes 1909, or may be set up in the petition as an anticipated defense and there attacked.
2. **———: ———: Sufficiency of Evidence.** In an action for personal injuries, where defendant pleaded a release in the answer, and plaintiff, in the reply, set up that the release was fraudulently procured while she was in such a mental condition that she did not understand what she was signing, *held*, that the evidence was sufficient to warrant submission to the jury of the issue raised by the reply.

3. **APPELLATE PRACTICE: Conclusiveness of Verdict: Improbable Evidence.** Where there is evidence to support the verdict of a jury, the appellate court has no right to interfere with it on the ground such evidence is improbable.
4. **EVIDENCE: Personal Injuries: Possible Causes for Condition.** In an action for personal injuries, which were chiefly of a nervous character, the exclusion of evidence, that plaintiff had separated from her husband on account of his habits of drink, was harmless, although plaintiff's physician had testified that such a separation might have affected her nervous condition, inasmuch as there was no showing or offer to show when the separation occurred nor how long it continued and hence nothing to connect it with the nervous condition for which damages were sought.
5. **STREET RAILWAYS: Injuries to Passenger: Explosion in Controller Box: Panic Among Passengers: Instructions.** In an action against a street railway company for injuries received by a passenger in being thrown between the seats of a street car by other passengers, who, with plaintiff, were endeavoring to escape from the car on account of fear of injury, caused by fire and smoke from explosions in the controller box, an instruction, summarized in the opinion, *held* to be based upon substantial evidence and within the allegations of the petition.
6. ———: ———: ———: ———: **Proximate Cause.** In an action against a street railway company for injuries received by a passenger in being thrown between the seats of a street car by other passengers, who, with plaintiff, were endeavoring to escape from the car on account of fear of injury, caused by fire and smoke from explosions in the controller box, where it appeared that the motorman failed to take steps to stop the car, after the explosion, until it had run several blocks, *held* there was a causal connection between the explosions and the panic among the passengers, and between the explosions, the fire, smoke and alarm and the alleged negligence of the motorman in failing to stop the car.
7. **DAMAGES: Personal Injuries: Amount of Recovery.** In an action for personal injuries, where it appeared that, as a result of her injury, plaintiff was compelled to give up her work which paid her twenty-five dollars per week, and that her nervous condition, resulting from her injury, had necessitated her confinement in a hospital for sixteen weeks, at an expense to her of seven dollars and fifty cents per week, *held* that a verdict for \$800 was not excessive.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

AFFIRMED.

Boyle & Priest and George T. Priest for appellant.

The court erred in overruling defendant's demurrer to the evidence and sending the case to the jury, because there was no evidence of any probative value tending to show that plaintiff was of unsound mind at the time the release in question was executed; her bald statement to the effect that she did not know she signed it is so outrageously against the conscience it raises no issuable fact. *Lange v. Railroad*, 151 Mo. App. 500; *Spiro v. Railroad*, 102 Mo. App. 250; *Lo-max v. Railroad*, 119 Mo. App. 1. c. 198.

John B. Denvir, Jr., for respondent.

(1) This case having been submitted to the jury under proper instructions, the court having found in favor of plaintiff and the motion for a new trial having been overruled by the trial court, the verdict is conclusive in this court. *Bank v. Beck*, 140 S. W. 672; *Linderman v. Carmin*, 142 Mo. App. 525. (2) The court did not err in excluding testimony. Moreover, if the court did err, the defendant is not in a position to take advantage of the court's error because it made no offer of proof. *Berthold v. O'Hara*, 121 Mo. 88; *Imboden v. Trust Co.*, 111 Mo. App. 220.

STATEMENT.—This is an action to recover damages for injuries alleged to have been sustained by plaintiff while a passenger on a street railway car, owned and operated by defendant on its line of railway in the city of St. Louis.

The petition in the case, setting out the fact of plaintiff being a passenger, avers that when the car was proceeding east on Washington avenue in the vicinity of Ewing avenue, the car being propelled by electricity, "there were sudden, violent and unusual explosions in the controller box or other machinery,

appliances or equipment of said car, due to the negligence and carelessness of the defendant in the care or operation of said car; that flames and smoke shot back into said car from said controller box or other machinery, appliances and equipment on said car, burning and choking passengers thereon, and setting fire to the front portion thereof; that the motorman in charge of said car (a servant and employee of defendant) retreated into said car and negligently and carelessly failed to turn off the electric power or apply the brakes to said car, until it had run several blocks, thereby permitting said explosion, fire and smoke to continue to occur. That the conductor in charge of said car (a servant and employee of defendant) likewise negligently and carelessly failed to turn off the electric power or apply the brakes or to use any effort to stop said car, and after said car had stopped, to open the doors of said car, which had to be broken open, without the assistance of said conductor. That in consequence of the premises, plaintiff and other passengers on said car, being in positions of apparent and imminent peril, endeavored to escape therefrom; that in doing so, plaintiff owing to the flames, smoke, the crowded condition of said car and the excited condition of the passengers thereon, caused by the carelessness and negligence of defendant as aforesaid, was thrown or pushed between the seats of said car; that plaintiff subsequently got as far as the door of said car and then lost consciousness; that when she recovered consciousness she was seated on the ground by a fence; that plaintiff's head was severely bruised, her arm and back severely bruised and sprained, and her nervous system greatly and permanently injured and shocked. That plaintiff was confined to the hospital for a period of, to-wit, sixteen weeks; that she has been incapable of pursuing her ordinary avocation, which is that of laundress, since the date of said injury, and is unable to pursue regularly any avoca-

tion at the time of the filing of this suit." Charging that her injuries are permanent and her earning capacity greatly diminished, if not entirely destroyed, and that she had incurred expense to the amount of \$250 for hospital services, medicine, medical attention and nursing, and will be obliged to incur expense for medicine in the future and that she still suffers and in the future will suffer great pain of body and mind because of the injuries brought about by the carelessness and negligence of defendant, she has been damaged in the sum of \$10,000, she demands judgment for that sum.

The answer, after a general denial, sets up a release claimed to have been executed by the plaintiff the day following the accident. This release purports to be in consideration of fifteen dollars paid plaintiff.

The reply, denying the allegations of the answer, sets up that on the morning of the day that plaintiff was injured, an agent of the defendant called on plaintiff with reference to the injuries; that at that time she was in the deepest distress and bodily pain, her nervous system unstrung and her mind wandering; that she required the assistance of eyeglasses to read and did not have any eyeglasses at hand at that time; that if she signed the release as set forth in the answer, she was unable to understand and did not understand the contents thereof or what she was doing, on account of her physical and mental condition, and that if the release set out was procured from her, it was wrongfully and fraudulently procured while she was in that condition; that while the agent of defendant gave or left with plaintiff or someone for plaintiff, an order on the treasurer of defendant for fifteen dollars, plaintiff was not conscious and had no recollection of that transaction; that she had never cashed the check or order or received any money therefor, and averring tender of the check or order to defendant before filing the suit, defendant's refusal to ac-

cept it and readiness of plaintiff at all times to surrender it, and that as she has deposited it with the clerk of the court for the use of defendant, she again tenders it.

The testimony introduced by plaintiff as to the facts attendant upon the accident was substantially as set out in the petition.

Plaintiff herself testified that overcome by the panic and by fright, and by the smoke in the car, she lost consciousness and when she came to herself she was sitting on the curb of the street and was taken by someone to a doctor's office. Attempting to go to her place of employment, she became very sick and vomited, but reached her home; did not remember going to bed or getting up the next morning, nor going downstairs. The first time that she remembers anything as occurring the day following the accident, was when her sister called the afternoon of that day and asked her if she did not want to see the doctor. After her sister suggested that, she went upstairs and went to bed. In a day or two she went to a hospital. Asked if she remembered a representative or claim agent of defendant calling on her in the morning of that day, she said she did not. Asked if she remembered signing a release or anything of that kind, she said she did not. She identified her signature to a paper which was shown to her and afterwards produced in evidence, and is the release pleaded, but she denied in the most positive terms any recollection of ever having seen or talked to the agent of defendant who procured her signature to the release, and denied, both on cross and redirect examination and in the most positive manner, any recollection of ever having signed or assented to it. It is dated the 6th of March, 1909, and is witnessed by a fellow employee of plaintiff and by the representative of defendant who was there making the settlement. No money was paid plaintiff under this release but a check for fifteen dollars was

given her which she had never cashed. Plaintiff further testified that she was forty-four years old, and is married, but while now living with her husband, had been separated from him. She was confined to the hospital about sixteen weeks; had contracted for her own board there, some seven dollars and fifty cents a week; had been obliged to give up all employment; had been earning about twenty-five dollars per month as laundress.

On the part of defendant, the agent who had represented its claim department in obtaining the release, testified very minutely and positively to all the transactions connected with the release and the conversation with plaintiff, in which he testified that she had told him about the accident and what had occurred and what she had done subsequently to it; about her visit to the physician, etc.

The physician who attended plaintiff testified to her objective symptoms and that she presented the appearance of a woman under considerable depression, appeared greatly depressed and quite nervous; that was all that the objective symptoms disclosed. The physician stated that if allowed he could state the subjective symptoms but on objection he was not allowed to do so. Plaintiff was under his care two or three months, he treating her for extreme nervousness and the results of nervousness. On cross-examination the physician testified that he had first attended the plaintiff some three or four days after the accident; found no bruises or contusions and no objective external symptoms of injury; did not examine the condition as to her nervous system at first but at various times afterwards he did and described how he had tested this. Asked by counsel for the defendant if the nerve disorder might be due to either a physical or mental condition, he answered; "in a general way, yes." He was then asked this question: "Suppose the evidence shows

that such a woman as Mrs. Logan is, has had considerable difficulty with her husband, growing out of his habits of drink and had become separated from him, could that not have a tendency of making her depressed or nervous?" He answered, "That would be a mere matter of opinion; I would say, yes, that it could."

Plaintiff, recalled for further cross-examination by defendant, was asked, "Mrs. Logan, your separation from your husband grew out of his habits of drink, didn't it?" She answered, "Yes, sir." Following that this appears: "Plaintiff's counsel objects to the question as incompetent; objection sustained, and answer stricken out." To this the defendant duly saved exception. At the time of the trial plaintiff and her husband were living together.

At the close of plaintiff's testimony in chief, defendant asked an instruction that under the law and evidence plaintiff could not recover. This was refused and defendant excepted. At the close of all the testimony counsel for defendant moved that plaintiff be required to elect on which of her defenses set up in the reply she would rely. The court stated he would govern that by instructions, to which counsel for defendant excepted, whereupon the court stated that the only issue in regard to the reply is as to whether or not plaintiff had sufficient mental understanding at the time to know what she was signing. There was no objection or exception to this statement.

At the close of the testimony the court gave three instructions asked by plaintiff, the first covering the case as to the alleged facts of the accident and alleged negligence of the defendant's employees, as to which the court instructed the jury that if they were proven, it would entitle plaintiff to recover. The second told the jury that if they found that the paper read in evidence as a release was signed by plaintiff

when she was in such a mental condition through pain and sickness, that she could not and did not comprehend or understand its contents, and that defendant's agent was aware of plaintiff's condition and induced her to sign the release while in that condition, and that owing to such mental condition plaintiff did sign the release without understanding or being able to understand its contents, and if they found that plaintiff had tendered the check or an order to defendant prior to the institution of the suit, they should find for plaintiff provided they further found that the injuries sustained by plaintiff, if any, were due to the negligence of defendant, as referred to in the first instruction. The third instruction is as to the measure of damages.

At the instance of defendant the court instructed the jury, first, that if they found from the evidence that plaintiff at the time she signed the release in evidence was of sound and contracting mind, their verdict must be for defendant. Second, that the jury are not to take the fact that there had been a settlement in this case as any admission of any liability on the part of defendant.

Of its own motion the court instructed the jury properly as to the credibility of witnesses and as to the number of jurors required to return a verdict. This first instruction was in lieu of one asked by defendant, imperfectly covering the same matter.

The jury returned a verdict for plaintiff in the sum of \$800, and defendant, interposing a motion for new trial and saving exception to that when it was overruled, has duly perfected appeal to this court.

REYNOLDS, P. J. (after stating the facts).—The errors assigned by counsel for appellant are: First, to the overruling of defendant's demurrer to the evidence on the ground assigned that there was no evidence of any probative value tending to show

that plaintiff was of unsound mind at the time the release in question was executed, it being argued that her bald statement, to the effect that she did not know she had signed it, is so outrageously against the conscience that it raises no issuable fact; second, that the court erred in excluding the question and answer before set out as asked the plaintiff, which, to repeat it, was, "Mrs. Logan, your separation from your husband grew out of his habits of drink, didn't it? A. Yes, sir." The third assignment of error is that the court erred in giving plaintiff's first instruction. The fourth is that the verdict is excessive.

We are unable to agree that the first assignment is tenable. A release, "when fraudulently or wrongfully procured from plaintiff," can be attacked by the reply, as provided by section 1812, Revised Statutes 1909, or, as held by the Supreme Court in *Berry v. St. Louis & S. F. R. Co.*, 223 Mo. 358 (122 S. W. 1043), where at page 369 the remarks of Judge MARSHALL in *Courtney v. Blackwell*, 150 Mo. 245, l. c. 278, 51 S. W. 668, are quoted approvingly, and as intimated by our court in *Carroll v. United Railways Co.*, 157 Mo. App. 247, l. c. 295, 137 S. W. 303, it may be set up as an anticipated defense in and by the petition and there attacked. Taking up plaintiff's own testimony as to the accident and her description of her acts and mental condition immediately subsequent to it, and on the day following, on which latter date this release was signed, as well as the undisputed testimony of the physician as to her nervous condition, for a long period following, we see nothing to warrant us in holding that her testimony, that she did not know she had signed the release, "is so outrageously against the conscience it raises no issuable fact." To the contrary, we see nothing improbable in it. If we did think it improbable, we are concluded by the verdict of the jury, who, under very carefully drawn instructions as to that issue, found against the defendant.

This is not such a case as those referred to in *Spiro v. St. Louis Transit Co.*, 102 Mo. App. 250, 76 S. W. 684; *Lomax v. Southwest Missouri Electric R. Co.*, 119 Mo. App. 192, 95 S. W. 945, or *Lange v. Metropolitan St. R. Co.*, 151 Mo. App. 500, 132 S. W. 31. In the *Spiro* and *Lange* cases the court was dealing with physical facts. In the *Lomax* case the court (l. c. 198) said, "The charge of fraud should have been supported by satisfactory evidence and not left to rest, as here, upon mere surmise and conjecture." In the case before us, the evidence that the release had been procured from plaintiff "fraudulently" (using that word in its technical sense) or "wrongfully," either of which is sufficient under section 1812 to avoid it, was supported by evidence that the jury certainly held to be satisfactory, and which we, as an appellate court, not seeing and hearing the witnesses who gave it, certainly cannot hold, in the light of that finding, to be either unsatisfactory or to rest on mere surmise and conjecture. Our court, in *McClanahan v. St. Louis & S. F. R. Co.*, 147 Mo. App. 386, l. c. 409 *et seq.*, 126 S. W. 535, on the authority of many cases there cited, has gone very far in holding that a verdict resting on testimony opposed to known physical facts cannot stand. Here we, as an appellate tribunal, are, and the jury and learned trial judge were, dealing, not with physical facts but a mental condition. The plaintiff described her mental condition, more accurately, her lack of conscious mentality, very fully. The existence of that mental condition must rest so entirely in the statements of the party so affected that it is difficult for a third party, an outside party, to undertake to enter into it; in truth, it is impossible to do so. It is so far subjective and personal that the establishment of it one way or the other rests almost entirely on the credit that is to be given to the party so testifying. In the case at bar the plaintiff was before the jury; so was the agent of defendant. No

one who was present when the agent claims to have had the conversation with plaintiff testified as to that conversation. The subscribing witness was called in and all she testified was that when asked to do so, she signed her name as a witness. The truth of the matter lay between plaintiff and the agent. The jury heard both; saw them; had the opportunity to weigh the testimony of plaintiff and to contrast it with the testimony given by the claim agent. They had before them the testimony of the attending physician as to the high nervous tension under which plaintiff labored immediately following and for a long period after the accident. They were properly instructed by the court as to the facts necessary to overthrow the release, not only by instruction given at the instance of plaintiff but by the very clear one given at the instance of defendant itself. Hence this question of mental condition, that is, of sufficient mental condition to know and understand what the plaintiff was doing at the time the release purported to be signed, having been properly submitted to the jury, its solution was with them, subject to the controlling supervision of the learned trial court. We are unable, if we were even disposed to do so, to disturb the finding on this point for this reason.

We are unable to concur with the contention of learned counsel for appellant as to their second assignment of error, that the exclusion of the testimony of plaintiff that the separation from her husband grew out of his habits of drink, is reversible error. When the court struck out the answer which plaintiff had given to this question, the matter ended there. While it was possibly error to have excluded this answer, we cannot believe that its exclusion under the circumstances affected the verdict of the jury to such an extent as to demand either reversal or cutting down of the amount of damages awarded. The jury fixed the damages at \$800. Counsel for appellant contend

that even if respondent was entitled to recover, \$400 would be more than ample remuneration for any injuries sustained. Even if the answer of respondent, that her separation from her husband grew out of his habits of drink, had been permitted to stand in connection with the testimony of the physician that difficulty with her husband might have contributed to her nervous condition, there was no offer or attempt to show when that difficulty occurred or how long it continued; whether before or after the confinement of respondent in the hospital. All that the physician said when asked if the nervous condition of respondent might be due to either a mental or physical condition, was, "In a general way, yes." When asked if the evidence showed that Mrs. Logan had had considerable difficulty with her husband, growing out of his habits of drink, and had been separated from him, whether that could not have a tendency to make her depressed and nervous, he answered, "That would be a matter of opinion; I would say yes that it could." We do not think that even with the answer of respondent remaining, the jury would have any substantial facts warranting them in assuming that this respondent was in truth rendered so nervous from her domestic relations as to send or keep her in the hospital; not even that this contributed to her then condition.

The third point argued by counsel is that the first instruction allowed a recovery on account of the continued explosions and for failure to bring the car to a stop, "when there was absolutely no causal connection between the continued explosions and the failure to bring the car to a stop." The fairest way to answer this is to summarize that instruction so far as it relates to the facts of the accident.

It, in substance, told the jury that if they found that while plaintiff was a passenger on the car there were sudden, violent and unusual explosions in the

controller box; that these explosions were followed by flames, fire and smoke in the car; and that the explosions, flames, fire and smoke were such as to fill with terror of immediate injury or death any reasonably prudent person who was a passenger upon the car; and that plaintiff became so alarmed and filled with fear and terror of immediate injury or death, and was injured by being thrown and pushed between the seats of the car while endeavoring to escape from such apparent and immediate danger, along with other passengers in the car similarly alarmed and likewise endeavoring to escape therefrom; and that the agents and servants of defendant, in permitting said explosions, flames and smoke to continue for the time mentioned in the evidence—if the jury believe they did so permit—or in failing to bring the car to a stop before the time mentioned in the evidence—if the jury believe they so failed—were guilty of negligence, “that is that they did not exercise therein the highest degree of care and skill that could be reasonably expected of prudent and skillful men under the same or like circumstances,” and that plaintiff sustained the injuries as theretofore defined, as a direct result of such negligence of said employees—then plaintiff could recover unless the jury found that the release prevents her recovery. The instruction as to the release followed and is not complained of as to form.

We see no occasion to condemn this instruction; it was based on substantial evidence and is within the petition. We cannot agree that there was no causal connection between the several explosions and the panic; between these explosions, the fire, smoke and alarm and the alleged negligence in failure to stop.

As to the fourth point made, that the verdict is excessive, we do not think, in the light of the testimony as to the character of the injury, the amount of expense to which plaintiff was put, her earning ca-

capacity, her present condition, that this verdict is excessive.

On consideration of the whole record in the case we find no reversible error. The judgment of the circuit court as heretofore ordered is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

JOHN DEHNER, Respondent, v. JOHN W.
MILLER, Appellant.

St. Louis Court of Appeals. Submitted on Briefs May 6, 1912.
Opinion Filed June 4, 1912. Opinion on Motion for
Rehearing Filed July 2, 1912.

1. **SALES: Refusal of Buyer to Accept: Remedies of Seller: Action for Contract Price.** Where, in pursuance of a contract of sale, the seller completes the article contracted for and tenders it to the buyer, and the buyer refuses to accept it and pay the agreed price, the seller may treat it as belonging to the buyer, hold it subject to his order, and recover the agreed price.
2. ———: ———: ———: ———: **Sufficiency of Evidence.** In an action for the contract price of baled straw, which the buyer refused to receive and which was held by the seller subject to the buyer's order, *held* that a verdict in favor of the seller was sustained by substantial testimony.
3. ———: ———: ———: ———: **Instructions.** Defendant agreed to pay plaintiff a certain price for a certain quantity of straw which the latter was to bale for him, if delivered at a certain point, and another price if delivered at another point. After receiving part of the straw, defendant refused to receive and pay for the balance. In an action for the purchase price, brought on the theory that plaintiff was holding for defendant the straw he had refused to receive, the court charged the jury, at the instance of plaintiff, that if they found that there was a contract of sale, that it had been performed by plaintiff, that the straw had been tendered to and refused by defendant, and that plaintiff was ready, willing and able to deliver it, they should allow plaintiff such sum per ton for such number of tons as defendant had agreed to buy and pay for, less the number of tons he had received and paid for. In another instruction, given at the instance of plaintiff, the court charged,

that if the jury found that defendant had purchased the straw and had received and paid for part of it, but had refused to receive the balance, and that plaintiff had the straw piled at a point from which he could have removed it to the places he had agreed to deliver it, the jury should find for plaintiff, but they should deduct from the amount they found, the cost of hauling the straw to the delivery points. *Held*, that there was no conflict between the instructions, and that the first instruction construed with the second, as it should be, was not erroneous; the amount of the recovery being within the limitations of the latter.

4. **INSTRUCTIONS: Construction: Entire Charge Considered.** In determining whether or not an instruction is correct, it should be read in connection with the other instructions given.
5. **SALES: Refusal of Buyer to Accept: Action for Contract Price: Measure of Damages.** Where, in pursuance of a contract of sale, the seller completes the article contracted for and tenders it to the buyer who refuses to accept it and pay the agreed price, and the seller holds the article for him and sues him for such price, the seller is entitled to recover, without proof that he has sustained actual damages, and the measure of damages is the contract price and not the difference between the contract price and the market value.
6. **TRIAL PRACTICE: Objection to Evidence: Time for Objection.** An objection to a question propounded to a witness which is not made until after the answer is given is properly overruled.
7. **SALES: Refusal of Buyer to Accept: Action for Contract Price: Evidence.** In an action for the contract price of baled straw, which the buyer refused to receive, an affirmative answer to a question propounded to the seller as to whether his wife had told him what the buyer had told her to tell him, nothing further being shown, was not vulnerable to the objection that it was erroneous as tending to show the making of another contract.

On Motion for Rehearing.

8. **———: ———: ———: Sufficiency of Evidence.** Where in pursuance of a contract of sale, the seller completed the article contracted for and tendered it to the buyer, who refused to accept it and pay the agreed price, and the seller, holding the article subject to his order, sued him for such price, an affirmative answer to a question propounded the seller, "Did you hold it for him?" was sufficient to establish that plaintiff held the article subject to the order of defendant, although the question, as put, was not in the present tense, under the rule that when a state of facts is once shown to exist, it is presumed to continue until the contrary is shown.

9. **EVIDENCE: Presumption: Continuance of Status Quo.** When a state of facts is once shown to exist, it is presumed to continue until the contrary is shown.
10. **SALES: Refusal of Buyer to Accept: Action for Contract Price: Instructions.** In an action for the contract price of baled straw, which the buyer refused to receive and which was held by the seller subject to the buyer's order, the court charged the jury, in an instruction given at the instance of plaintiff, that, in order to find for plaintiff, they must find, among other things, "that plaintiff had the straw baled and was ready, willing and able to deliver it to defendant." *Held*, that if this instruction was not definite enough to meet defendant's theory concerning plaintiff's duty to hold the straw, he should have asked an instruction covering it.
11. ———: ———: ———: **Not Necessary to Show Condition of Property.** In an action for the contract price of baled straw, which the buyer refused to receive and which was held by the seller subject to the buyer's order, it was not necessary for plaintiff to prove that he had protected defendant's interests by making a timely sale of the straw or by safely storing it, since, under the theory upon which the action was brought, it was not plaintiff's duty to sell and look to defendant for the loss, but he held the hay for defendant, and if, when payment is made, the hay is not produced in good condition, his liability as bailee may arise in another action.

NORTONI, J., dissents.

Appeal from Lewis Circuit Court.—*Hon. C. D. Stewart*, Judge.

AFFIRMED.

Hilbert & Hilbert and *A. F. Haney* for appellant.

(1) Plaintiff's instruction No. 1 prescribes an erroneous measure of damages for this case, to-wit: the entire agreed price of the straw which defendant refused to accept. Defendant's refused instruction No. 7 states the correct measure of damages for cases of the character of this one. As a general rule, in actions by the vendor against the vendee, for the non-acceptance of property sold or contracted for, the measure of damages is the difference between the price

agreed upon and the market value of the property at the time and place of the delivery. *Brown v. Mfg. Co.*, 210 Mo. 260; *Lumber Co. v. Warner*, 93 Mo. 374; *Rickey v. Tenbroeck*, 63 Mo. 563; *Bank v. Ragsdale*, 171 Mo. 168; *Parlin & Orendorff Co. v. Boatmen*, 84 Mo. App. 67; *Halliday & Co. v. Lesh*, 85 Mo. App. 285. The two special rules for measure of damages, which are exceptions to the above general rule, are as follows: (a) The vendor, if he has the property ready for delivery, may treat the property as belonging to the vendee, and, holding it subject to the vendee's order, may bring suit for the full purchase price, such proceeding being substantially a suit for specific performance; and (b) The vendor, if he has the property ready for delivery, may treat the property as belonging to the vendee, sell it for the vendee's account, and recover the difference between the proceeds of the sale and the agreed price. *Range Co. v. Mercantile Co.*, 120 Mo. App. 438; *Campbell v. Woods*, 122 Mo. App. 719; *Lumber Co. v. Lumber Co.*, 51 Mo. App. 555; *Vinegar & Spice Co. v. Wehrs*, 59 Mo. App. 493; *Lumber Co. v. Warner*, 93 Mo. 374. (2) To the extent that the straw was perishable property, it was plaintiff's duty (if he was holding it as defendant's property) to protect defendant's property therein by a timely sale or a safe storage; and upon his failure to do this, he is not entitled to recover the agreed price of the straw. *Dobbins v. Edmunds*, 18 Mo. App. 307; *Wall v. Cold Storage Co.*, 112 Mo. App. 659. (3) Instruction No. 6 asked by defendant should have been given because there was no proof of the market value of the straw. Instruction No. 5 asked by defendant should have been given restricting the plaintiff to nominal damages. Upon failure to prove the market value of the straw, plaintiff is not entitled to recover more than nominal damages, unless he shows that there was no market value. *Brown v. Mfg. Co.*, 210 Mo. 260. (4) Plaintiff's instruction No. 1 is errone-

ous also because it does not permit the jury to deduct from the straw defendant is charged with the three tons of it plaintiff sold to other parties; nor does it permit the jury to deduct from the agreed price of the straw the expense that would have been incurred in hauling it to the place of delivery. (5) The cause of action alleged in the petition is not supported by the evidence. The verdict is not supported by the pleadings and the evidence. (a) The cause of action stated in the petition is based upon only one contract therein set out. Plaintiff in his evidence depends upon two separate and distinct contracts made at different times and pertaining to different subject-matters, in order to establish his cause of action. (b) The contract pleaded is an executed contract of sale of a designated lot of straw; the second of the two contracts relied on in the evidence is an executory agreement for the future purchase of whatever straw plaintiff might be able to procure in the local market.

O. C. Clay for respondent.

Appellant insists that respondent's instruction numbered one is wrong because it directs the jury that if they should find for the plaintiff they must "allow him such sum per ton for such number of tons as the defendant had agreed to buy and pay for less the fifty tons he did receive and pay for." He follows this by saying that instruction number seven asked by defendant should have been given because it presents the only proper and correct measure of damages to cases of this kind, to-wit: That the proper rule of damages is the difference between the contract price and the current price at the time and place of delivery as fixed by the contract of sale and purchase." In these statements and assertions he entirely ignores instruction number 2 as declared by the court in this case and also the law as declared in this state by both

the Supreme Court and the court of appeals of this state, wherein and whereby as respondent has shown in his behalf that, in such case as the one at bar, the vendor has the choice of three remedies for damages, when he, the appellant, violates his contract, and refuses to accept and receive the goods or part of them when tendered or offered to him, to-wit: *Ingram v. Matthein*, 3 Mo. 211; *Pond v. Weyman*, 15 Mo. 181; *Dobbins v. Edmonds*, 18 Mo. App. 307; *Walker v. Nixon*, 65 Mo. 326; *Steinberg v. Gebhardt*, 41 Mo. 520; *Vinegar & Spice Co. v. Wehrs*, 59 Mo. App. 493; *Stumpf v. Mueller*, 17 Mo. App. 283; *Anderson v. Frank*, 45 Mo. App. 482; *Lumber Co. v. Lumber Co.*, 51 Mo. App. 555; *Peck & Co. v. Corrugating Co.*, 96 Mo. App. 212; *Campbell v. Woods*, 122 Mo. App. 719; *Range Co. v. Mercantile Co.*, 120 Mo. App. 432; *Koenig v. Truscott Boat Co.*, 155 Mo. App. 685; *Riley v. Stevenson*, 118 Mo. App. 187.

REYNOLDS, P. J.—This action was commenced before a justice of the peace in Lewis county and a statement in the form of a petition there filed by plaintiff, setting out that on a day named defendant contracted and agreed to purchase from plaintiff and did purchase from him a lot of wheat and oat straw, to be baled by plaintiff and delivered by him to defendant at the town of Canton, at the price of three dollars and twenty-five cents per ton if delivered on the banks of the Mississippi river, or three dollars and fifty cents per ton if delivered in cars or on barges on the bank of the river. Plaintiff avers that under this agreement he baled 118 tons and 765 pounds, of which he delivered about fifty tons to defendant which defendant received and paid for; that he had baled the remainder, consisting of sixty-eight tons and 765 pounds, and was ready to be delivered to defendant but defendant, after putting him off from time to time, finally refused to ac-

cept it, although plaintiff has at all times been ready and willing to deliver the same at the price agreed upon. Wherefore he claims defendant is indebted to him for the contract price \$205.12½, for which he asks judgment with interest and costs.

It appears that defendant recovered before the justice whereupon plaintiff appealed to the circuit court, where on a trial anew before the court and a jury, the jury returned a verdict for plaintiff in the sum of \$187.91. From this, filing a motion for new trial and one in arrest, and saving exceptions to these motions being overruled, defendant has duly perfected his appeal to this court.

There are six errors assigned here by appellant. First, to error in overruling the motion for new trial. Second, to error in giving instruction No. 1 asked by plaintiff. Third, fourth and fifth, to error of the court in refusing three instructions asked by defendant, and sixth to the error of the court in admitting improper evidence over the objections of defendant.

It will be observed by the statement or petition that plaintiff, claiming to have made a sale and tendered the articles sold and averring the refusal of defendant to accept a large part of these articles, that is baled straw, claims that defendant is liable to him for the contract price. That is to say, plaintiff, averring performance of the contract and completion and tender of the articles contracted for and failure to receive and pay for these, has elected one of the three remedies to which the vendor is entitled on a breach of a contract of sale of personal goods. That he had a right to do this is clear. The decisions sustaining that right have so recently been fully gone over by this court in *Koenig v. Truscott Boat Mfg. Co.*, 155 Mo. App. 685, 135 S. W. 514, that it is unnecessary to go into a discussion of the proposition. Plaintiff in this case, respondent here, as did the defendant and respondent in *Koenig v. Truscott Boat Mfg. Co.*, *supra*,

has elected to sue for the contract price. He was entitled to recover that provided the evidence showed the contract, performance by plaintiff and refusal by defendant to pay the price. We have read all the evidence as abstracted by counsel for both sides and have no hesitation in saying that the verdict arrived at by the jury is sustained by substantial testimony.

The amount of recovery is within the second instruction given by the court at the instance of plaintiff and which learned counsel for appellant have apparently overlooked. By the first instruction which the court gave at the instance of plaintiff, after advising the jury that it was necessary to find the contract and its performance by plaintiff and refusal to accept the straw by defendant, and that plaintiff was ready, willing and able to deliver the straw, the court told the jury that if they found for plaintiff they should allow such sum per ton for such number of tons as defendant had agreed to buy and pay for, less the number of tons he had received and paid for, if the jury found and believed that plaintiff had the straw baled and was ready, willing and able to deliver to defendant at the place specified. The second instruction told the jury that if they should find from the greater weight of evidence that defendant purchased the straw and received and paid for part of it and thereafter put the plaintiff off from time to time in regard to receiving the balance of the straw and finally refused to receive it, in that event they would find for plaintiff, provided they also found that plaintiff had the straw baled and had it at such point that he could have delivered it and that he was ready, willing and able to deliver it on the bank of the Mississippi river or in cars or barges to be furnished by defendant at Canton and was prevented from doing so by defendant refusing to receive and accept it. The court further proceeded in this same instruction to tell the jury that if they found "that the plaintiff

had the straw baled and piled at a point from which he could have removed it to the Mississippi river or put it on cars or barges to be furnished by the defendant and the defendant failed to furnish said cars or barges and refused to receive and accept the balance of said straw, then in that event the jury must find for the plaintiff but they should deduct from the amount they should so find, the cost of hauling the straw from such point to the bank of the Mississippi river or to the cars or barges at Canton." This was as much as defendant was entitled to in the way of credit or deduction from the purchase price, and the amount of the verdict shows that the jury followed this. Construing the first and second instructions together, as must always be done, and there being no contradiction or conflict between them, we find no error as assigned by the counsel for defendant in the matter of the first instruction, none being assigned to the second.

The three instructions asked by appellant and refused by the court were properly refused for the same reason assigned by us in *Koenig v. Truscot Boat Mfg. Co.*, supra, for refusing like instructions there asked. Defendant attempted by these instructions to force the plaintiff to an election of the remedy which he had not chosen to follow. The first and second of these instructions, numbered 5 and 6, were based on the theory that plaintiff was entitled to merely nominal damages as he had not introduced any proof of actual damage sustained. That was not the theory upon which this case was prosecuted by plaintiff. The third instruction, numbered 7, attempted to place the rule of the measure of damage at the difference between the contract price and the market value. This was properly refused for the same reason.

The only evidence that can be said to come under the sixth assignment of error as having been evidence improperly admitted over the objections of

Dehner v. Miller.

defendant is this: "Q. Did your wife tell you what Mr. Miller told her to tell you in his absence? A. Yes, sir." This answer having been given counsel for defendant said: "We object and ask that that be stricken from the record because not competent evidence in the case." This was overruled and defendant excepted. That was the end of the matter, no evidence as to any new contract following. The objection was properly overruled for the very sufficient reason that it was not made until after the answer had been given. Furthermore, waiving that, we are unable to see how this question and answer tended to show the making of two contracts, yet that is the contention of counsel and the objection to this question now made. It is to be said as to this contention and the point involved in it, that no such objection and no such point were made at the trial of the cause. With the single objection and motion above noted, all of the testimony in the case was introduced and received without any objection whatever on the part of defendant. Over and above that we are warranted in saying that a reading of the testimony as abstracted by counsel fails to show two contracts, so that in no view of the case is this assignment or this point tenable. It follows from this that the first assignment of error in overruling defendant's motion for a new trial is untenable.

The judgment of the circuit court is affirmed. *Caulfield J.*, concurs. *Nortoni, J.*, dissents.

ON MOTION FOR REHEARING.

REYNOLDS, P. J.—A motion for rehearing, supported by a very elaborate brief and argument, has been filed by the learned counsel for appellant. There are two points of complaint in this motion. First, that we had entirely overlooked the point made by

those counsel, that plaintiff is not entitled to the recovery of the alleged contract price of the straw which plaintiff claims, because, it is alleged, there is no evidence tending to show that after defendant's alleged refusal to take the straw, plaintiff treated it as belonging to defendant and continued to hold it subject to defendant's order and was so holding it at the time the suit was brought to recover the purchase price thereof; that on the contrary plaintiff had himself twice testified that he sold three tons of this straw to parties in Canton and appropriated the proceeds thereof to his own use.

The second ground for rehearing is that it being plaintiff's duty, if he was holding the straw as defendant's property, to the extent that the straw was perishable property, to protect defendant therein by a timely sale or safe storage, it is argued that there is no evidence showing that he had done either of these.

We did not overlook any of counsel's points but did not specifically discuss them, for our decision necessarily disposed of them.

We have examined the abstract of the record in this case very carefully, particularly the counter-abstract furnished by counsel for respondent, which is much fuller than that of appellant, and find that plaintiff distinctly testified that defendant refused to take the straw. He was then asked this question: "Did you hold it for him?" He answered, "Yes." There was no contradiction of this testimony whatever. The court, as we stated in our opinion, in its instruction to the jury, distinctly said that to entitle plaintiff to recover they must find from the greater weight of evidence in the case "that plaintiff had the straw baled and was ready, willing and able to deliver it to the defendant on the banks of the Mississippi river or on cars or barges on the Mississippi river at Canton." This was in the

first instruction given at the instance of plaintiff. There was evidence to support this in the uncontradicted testimony of the plaintiff. It is true that the answer to the question which we have given is not in the present tense, but it was sufficient *prima facie*, on the well known rule that when a state of things is once shown to exist, it is presumed to continue until the contrary is shown. It was very easy in this case for defendant, if his defense was that plaintiff did not have, at the time of the trial, the straw ready to deliver to defendant, to have asked as to that. If this instruction was not definite enough to meet the theory of defendant on the duty to hold the straw for defendant, he should have asked one himself covering it. He did ask many, four of which were given, three refused; none of them touched this.

Another point made in connection with this first proposition is that it appears plaintiff had sold part of this straw and hence could not deliver all. We do not so understand the testimony of plaintiff. Reading all of the testimony over as furnished in the abstracts of both parties, we think it clear that the bales of straw which plaintiff admitted he had sold did not come from the straw he had sold defendant.

So far as concerns the second proposition, that it was plaintiff's duty, if holding the straw as the property of defendant, by a timely sale or safe storage, to have protected defendant, and that there is no evidence that he did either, it is sufficient to say that we do not think it was the duty of plaintiff to sell and look to defendant for any loss; he is not proceeding on that theory. As we understand the law, the bales in the hands of plaintiff are held by him for defendant. If when defendant has made payment for the remaining bales and they are not produced in good condition, the question may arise as to whether plain-

tiff, as bailee, has taken proper care of the straw. That question is not present in this case.

The motion for rehearing is overruled. *Caulfield, J.*, concurs. *Nortoni, J.*, dissents.

STATE OF MISSOURI, Respondent, v. W. T.
BRISCO, Appellant.

St. Louis Court of Appeals. Argued and Submitted March 5, 1912.
Opinion Filed April 2, 1912. Opinion on Motion for
Rehearing Filed July 19, 1912.

1. **CRIMES AND PUNISHMENTS: Appellate Practice: Necessity of Filing Motion for New Trial: Record Proper.** In the absence of a motion for a new trial, filed in apt time, and an exception duly saved to its denial, all the proceedings of a criminal trial are closed to examination on appeal, except those shown by the record proper, which, in the case at bar, is *held* to consist of the information, the plea, the submission of the cause to the court, the finding, and the judgment or sentence.
2. **BARBERS: Conducting School Without Permit: Indictments and Informations: Sufficiency.** An information charging accused with conducting a barbers' school without obtaining a permit from the State Board of Barber Examiners, in violation of section 1192, Revised Statutes 1909, which charges the offense substantially in the language of the statute, is sufficient.
3. **APPELLATE PRACTICE: Conclusiveness of Supreme Court's Decision: Law of Case.** Where the Supreme Court, on a motion to transfer a case, pending on appeal, to the Court of Appeals, held that the motion for a new trial was not filed in time, the Court of Appeals is thereby precluded from reviewing any matters requiring such motion as a prerequisite to review on appeal.
4. **JURISDICTION: Courts of Appeals: Construction of Federal Constitution.** The determination of questions involving the con-

struction of the Federal Constitution is not within the jurisdiction of the St. Louis Court of Appeals, under section 12, article 6 of the Constitution of Missouri, as amended by section 5 of the Constitutional Amendment of 1884.

5. **CRIMES AND PUNISHMENTS: Appellate Practice: Necessity of Filing Motion for New Trial.** Even if questions involving the construction of the Federal Constitution were within the jurisdiction of the St. Louis Court of Appeals, they could not be reviewed in a criminal case, where they were not presented in the lower court, and preserved for review by the filing of a motion for a new trial.

Appeal from St. Louis Court of Criminal Correction.
—*Hon. Benjamin J. Klene*, Judge.

AFFIRMED.

Louis A. Steber for appellant.

Elliott W. Major, Attorney-General, and *James T. Blair*, Assistant Attorney-General, for respondent.

REYNOLDS, P. J.—The information in this case, filed in the St. Louis Court of Criminal Correction by the Assistant Prosecuting Attorney, charges the defendant with a violation of section 1192, Revised Statutes 1909, in that on the day named he had wrongfully, wilfully and unlawfully conducted and operated a barber college and barber school without first having obtained from the state board of barber examiners, a permit so to do. The information is substantially in compliance with the statute, specifying that the city of St. Louis is a city of over 5000 inhabitants and giving the names of the parties claimed to have been instructed by defendant in the business of barbering. There being a finding against defendant and a fine of ten dollars imposed by the Court of Criminal Correction, defendant appealed to the Supreme Court. That court, on motion of the Attorney General, transferred the cause to this court. In sustaining the motion to transfer, which was vigorously resisted in that court by the learned counsel for appellant, the Supreme Court, Division No. 2, handed

down an opinion, filed February 11, 1911, which will be found under the title *State v. Brisco*, 237 Mo. 154, 135 S. W. 58. In that opinion Judge KENNISH, speaking for the other members of the court, distinctly holds that as neither the motion *non obstante veredicto* the motion for a new trial, nor the motion in arrest of judgment were filed until after sentence and judgment, these motions were not before the court; that the fact that a second judgment was entered after the filing and overruling of these motions did not change the situation, "the first judgment being a valid one, and not having been vacated or set aside, the second judgment was a nullity. [*State v. Riley*, 228 Mo. 431, 128 S. W. 731.]"

Not satisfied with this ruling, the learned counsel for appellant filed a motion for rehearing, whereupon, in an opinion filed November 14, 1911, reported 237 Mo. 154, 140 S. W. 885, Division No. 2 of the Supreme Court overruled the motion for rehearing on the distinct ground that the motions for new trial and in arrest having been filed out of time were nullities and could not be considered as a part of the record in the cause.

We are compelled to hold that under these two decisions of our Supreme Court in this identical case, there is nothing before us for consideration or review but the record proper, that is to say, the information, the arraignment, the plea, the submission of the cause to the court, the finding, and the judgment or sentence.

Learned counsel for appellant insists that even in the absence of a motion for a new trial, we can look into the whole record by which he seems to mean the proceedings at the trial, that including the evidence, and determine from an inspection of this whether error materially affecting the rights of the defendant has been committed. He cites authorities from outside states that seem to lend color to this contention, but it has been too long settled in our state that in the

absence of a motion for new trial, filed in apt time and exception duly saved when that is overruled, all the proceedings, apart from those of the record proper, are closed to examination by the appellate court.

Consideration of the information filed in this case and comparison of it with section 1192, Revised Statutes 1909, on which it is bottomed, satisfies us that it charges an offense substantially in the language of that statute. That is sufficient. Indeed, the learned counsel for appellant makes no very serious contention over the form of the information, and, to do him justice, it must be said that the appeal in this case was evidently taken on the theory that the constitutional questions upon which he relied had been duly presented and decided adversely. But our Supreme Court has held otherwise and it is unnecessary for us to say to counsel as learned as he in the law, that that closes all inquiry by us on that matter; that is, the Supreme Court having held, in this case, that no motion for a new trial had been filed in time, we cannot go into matters which can only be open to us when a motion for a new trial has been duly filed and acted upon.

Counsel, however, in this court presents propositions under the Federal Constitution which he submits makes it the duty of this court to consider any and all questions that properly arise under the Federal Constitution. In support of this he urges that the Federal Constitution is the supreme law of the land; that the act under consideration is unconstitutional under that Constitution; that it is in violation of the 14th Amendment to the Constitution of the United States in that it involves an arbitrary classification, based upon no difference, which bears a reasonable and just relation to the act or business regulated, places burdens upon one class of persons not shared by others, and is in violation of the fundamental principles of the Federal Constitution in that

that instrument secures the liberty of contract to labor which includes both parties to it.

The determination of these questions is as foreign to our jurisdiction as are the questions involving the construction of the Constitution of our own state. [Missouri Constitution, section 12, article 6, as amended by section 5 of the amendments adopted by the people at the November election, 1884.] Even if we should admit that it is within the jurisdiction of our court to pass upon a case in which is involved the construction of the Constitution of the United States, all such questions are as completely closed to us here by the foregoing decisions of our Supreme Court as are any questions involving the construction of the Constitution of our own state. They have not been presented in the lower court and preserved for review by the apt filing of a motion for a new trial.

Finding no error in the record proper and guided and governed by these two decisions of our Supreme Court in this very case, we hold that we can do nothing but affirm the judgment of the St. Louis Court of Criminal Correction. It is so ordered; that judgment being affirmed. *Nortoni and Caulfield, JJ.*, concurring.

ON MOTION FOR REHEARING.

PER CURIAM.—A motion for rehearing was filed in this case and counsel for appellant asked us to hold up consideration of that motion until the case of *Moler v. Wilson*, first pending in our Supreme Court for determination, then on a motion for rehearing, had been finally disposed of. That has occurred, the decision of the court reported — Mo. —, 147 S. W. 985. On consideration of that decision, we find no reason to change the conclusion heretofore reached by us in this case. The motion for rehearing is overruled. All concur.

AMERICAN STORAGE & MOVING COMPANY,
Respondent, v. WABASH RAILROAD COM-
PANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted April 1, 1912.
Opinion Filed May 7, 1912. Motion for Rehearing
Overruled July 19, 1912.

PRINCIPAL AND AGENT: Evidence: Admissions of Agent: Evidence of Agency. In an action against a railroad company for conversion of a shipment of goods, uncontradicted evidence that plaintiff, having gone to the general freight office of defendant relative to the shipment, an undisputed agent of defendant pointed out to him, as the chief clerk of defendant and in charge of the matter, a person sitting at a desk in such office, ostensibly engaged in defendant's business, and that such person took up the matter with plaintiff in a manner showing he was familiar with it and that it was within his charge, was sufficient to establish his agency for defendant, so as to render his conversation on such occasion, relative to the shipment, admissible in evidence against it.

Appeal from St. Louis City Circuit Court.—*Hon.*
William M. Kinsey, Judge.

AFFIRMED.

N. S. Brown and *Bates, Blodgett, Williams & Davis* for appellant.

(a) The testimony of witness Russell was improperly admitted in evidence. (b) Without the testimony of witness Russell, no evidence was adduced of the wrongful delivery of the shipment and defendant's demurrer to the evidence should have been given. *Spencer v. Ins. Co.*, 112 Mo. App. 86; *McGraw v. O'Neil*, 123 Mo. App. 699; 2 Cook on Corporations (6 Ed.), p. 2363.

B. O. Davidson and A. R. Russell for respondent.

The testimony of witness Russell, as to admissions of the chief clerk of the freight department of the defendant relative to wrongful delivery, was properly admitted in evidence, the circumstances sufficiently identifying the chief clerk as agent of the defendant, and the subject-matter being within the apparent scope of his duties. *Council v. Railroad*, 123 Mo. App. 437; *Ingalls v. Averitt*, 34 Mo. App. 371; *Tel. Co. v. Wells*, 39 So. 838, 2 L. R. A. (N. S.) 1077.

REYNOLDS, P. J.—This case comes to us on a second appeal, the first by plaintiff from the action of the trial court in directing a verdict for defendant; this present appeal from a verdict in favor of plaintiff. The facts of the case are set out in the statement made by Judge GOODE when the case was previously before this court. As the facts on the present trial are practically as in the former trial, it is hardly necessary to do more than refer to the report of the case as found under the title *American Storage & Moving Company v. Wabash Railroad Company*, 146 Mo. App. 224, 123 S. W. 964. In the present appeal by the defendant from an adverse verdict, it is very earnestly insisted that the fundamental error in the case was in admitting in evidence the testimony of a witness for plaintiff as to his conversation with a person, whom the witness understood to be the chief clerk of the freight department of the defendant company. We therefore give that more at length than as before reported. The testimony of the witness as to this conversation, as set out by appellant's counsel in their statement and brief, is to the effect that this witness "called at the general freight office of the defendant, in the Lincoln Trust Building, St. Louis, Mo., and made inquiries there as to whether or not delivery had been made of the goods; that he made two visits without being able to ascertain whether goods had

been delivered, or where they were; then on the third visit he was referred by the clerk, called the 'tracing clerk' to another clerk in that department, whom the tracing clerk said was the chief clerk of the general freight department; that he asked the last-named clerk what had been done with the car, and the clerk replied, 'We delivered the car to Mr. Leigh;' that he asked him why he had made delivery without taking up the receipt given at the time the shipment was made, to which the clerk replied, 'that Mr. Leigh had given a bond to indemnify them against damage for making a delivery without taking up the receipt.' " So far from the brief of appellant. Referring to the record itself, it appears that when this statement of the gentlemen, who is claimed to have been the chief clerk of the general freight department, was made to the representative of plaintiff, that the latter said to this person that it seemed that the only thing that was left for plaintiff to do was to bring a suit against the Wabash Railroad Company for its conversion of the goods, to which this person answered, "Yes, that is the only thing you can do. Mr. Leigh objects to the amount of these storage charges, and the company and Mr. Leigh ought to get together, and if they can't agree on this the only thing you can do is to sue this company, and Mr. Leigh can come in and defend. It is nothing to the Wabash Company one way or the other, for we are fully indemnified by the bond of Mr. Leigh." It very clearly appears that when the agent of plaintiff had not only gone in person to this general freight office of the defendant company but had called it up over the telephone, to inquire about this missing shipment, and when on this last occasion, which was his third visit to this known general freight office of the Wabash Railroad Company, in the city of St. Louis, and again made inquiry of a clerk in that office as to whether or not a delivery had been made of the goods, he was referred by that clerk to a gen-

tleman sitting at a desk there and whose name was given to the witness at the time but whose name the witness, at the trial, was unable to recall. The witness testified that he addressed this gentleman by name; that he was sitting at a desk in the general freight office and appeared to be in charge of the matter and was the gentleman to whom the witness had been referred by the tracing clerk of the defendant, with whom he had had the previous conversations. He gave the name of the tracing clerk and stated that this all occurred at the general offices of the Wabash Railroad Company in the Lincoln Trust Building in St. Louis, in the general freight department. This tracing clerk in the office, with whom he had had previous conversations in an endeavor to trace the shipment, told him, on the last occasion of his visit there, that the chief clerk had charge of the matter, naming him and pointing him out, "as over at that desk and you will have to take up the matter with him." Whereupon witness went to this gentleman, addressing him by name, and stated to him that his business was to find out what had become of the carload of goods shipped by the American Storage & Moving Company on the date named. Whereupon this gentleman gave him the information above set out.

It is strenuously argued that this is no sufficient identification of the person named as an agent of the defendant, or that he was at the time in the discharge of his duty as such agent, or that the information was given by him in the line of his duty. Hence it is argued that the declarations of this person are not binding upon this defendant and that the conversation had with him should not have been admitted. We cannot agree to this. There is no contradiction whatever in the record of this testimony of the agent of the plaintiff. It was had in a known office of the defendant; with a person pointed out by an undisputed employee of defendant there in that office, as the chief clerk of

that department; the latter sitting at a desk in that office, ostensibly engaged there in the business of the defendant, and who took up the matter in a manner showing that it was one with which he was familiar. This conversation concerning it bore intrinsic evidence of the fact that it was a matter within his charge. Uncontradicted and believed, it established agency. If it is true that the conversation did not take place between the agent of plaintiff and one who in fact was at the time the chief clerk of the freight department of the defendant, and in charge of this matter for defendant, disproof of that was within the power of defendant; it was an easy matter for the defendant to have called its chief clerk and have him either give his version of the conversation or deny the conversation *in toto*. That was testimony peculiarly within the power of the defendant to produce and it utterly failed to do so. That failure was obvious to court and jury. This is the real point of the contention of the defendant for a reversal of this case, and we hold it untenable. We hold that there was evidence to show that the person with whom the conversation was had, was the representative of defendant, and that the conversation with him was properly admitted.

The instructions given at the instance of plaintiff, submitting the question of this agency to the jury, were proper. While on the present trial two instructions were given at the instance of plaintiff, of which some criticism is made, they substantially follow the law as laid down by this court as applicable when the case was previously before us. The criticisms now made on these instructions by learned counsel for the defendant are more verbal than substantial.

We hold that the case was properly presented to the jury on the law, and the questions of fact being for the determination of the jury, their verdict is conclusive. The judgment of the circuit court is affirmed. *Norton and Caulfield, JJ.*, concur.

M. A. JOY, Appellant, v. ROBERT E. LEE et al.,
Respondents.

St. Louis Court of Appeals, July 19, 1912.

1. **CARRIERS OF PASSENGERS: Liability for Loss of Passenger's Effects.** A carrier of passenger cannot, by posting a notice that it will not be liable for articles of value kept by passengers in their staterooms, exempt itself from liability for loss from a passenger's stateroom of such articles of necessity and convenience as are usually carried by passengers.
2. ———: ———: **Contributory Negligence: Sufficiency of Evidence.** In an action against a steamboat company for money lost by a passenger from his stateroom, *held* that the evidence warranted a finding that plaintiff was guilty of contributory negligence and, therefore, not entitled to recover.
3. ———: ———: **Instructions.** In an action against a steamboat company for money lost by a passenger from his stateroom, where the court charged that the passenger had a right to retain such a sum of money in his possession in his stateroom as was a reasonable amount for him to carry, taking into consideration his journey and station in life, notwithstanding the carrier's notice that he would not be liable for the loss of valuables not deposited with the clerk, the refusal of an instruction, defining baggage as such articles of necessity and convenience as a passenger habitually carries, including money and jewelry, was not improper, being covered by the instruction given.
4. **INSTRUCTIONS: Refusal: Covered by Other Instructions.** It is not error to refuse an instruction which is covered by other instructions given.

Appeal from St. Louis City Circuit Court.—*Hon.*
George H. Williams, Judge.

AFFIRMED.

John K. Lord, Jr. for appellant.

- (1) A steamboat engaged in the carriage of passengers for hire, is a common carrier. 6 Cyc. 535.
- (2) As to baggage retained by a passenger in his own

possession, a carrier is under the duty of exercising reasonable care to protect it from loss, and is liable for loss of such baggage occurring by reason of his failure to exercise such care, unless the loss was the result of the passenger's negligence. *Woodruff v. Diehl*, 84 Ind. 474; *Prickett v. Anchor Line*, 13 Mo. App. 436; *Root v. Sleeping Car Co.*, 28 Mo. App. 199; *Wilson v. Railroad*, 32 Mo. App. 682; *Hampton v. Railroad*, 42 Mo. App. 134; *Morrow v. Car Co.*, 98 Mo. App. 351; 25 Am. and Eng. Ency. Law 1117; 6 Cyc. 661; *Mudgett v. Steamboat Co.*, 1 Daly (N. Y.) 151; *Gore v. Transp. Co.*, 2 Daly (N. Y.) 254; *Crozier v. Steamboat Co.*, 43 How. Pr. (N. Y.) 466; *Amer. Steamboat Co. v. Bryan*, 83 Pa. St. 446; *Macklin v. Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229; *Lincoln v. Steamboat Co.*, 30 Misc. (N. Y.) 752; *Adams v. Steamboat Co.*, 151 N. Y. 163; 3 Am. and Eng. Ency. Law 551; *Bonner v. Grumbach*, 2 Tex. Civ. App. 482; 2 *Fetter on Carriers of Passengers*, sec. 638; *Williams v. Packet Co.*, 3 Cent. L. J. 400. (3) By the term "baggage" is meant such articles of necessity and convenience as travelers usually carry for their personal use, comfort, instruction or amusement, having regard to the length of the journey, the purpose for which it is made, the position in life and occupation of the traveler and includes not only clothing but jewelry ordinarily worn by the traveler and his expense money for the journey. 6 Cyc. 667; *Nevins v. Steamboat Co.*, 4 Bosw. (N. Y.) 225; *Woodruff v. Diehl*, 84 Ind. 474; *Root v. Sleeping Car Co.*, 28 Mo. App. 199; *Morrow v. Car Co.*, 98 Mo. App. 351; *Wilson v. Railroad*, 32 Mo. App. 682; *Hampton v. Railroad*, 42 Mo. App. 134; 25 Am. and Eng. Ency. Law 1120; *Spooner v. Railroad*, 23 Mo. App. 409; 99 Am. St. Rep. 343, 348; *Doerner v. Railroad*, 149 Mo. App. 170; *Hill v. Pullman Co.*, 188 Fed. Rep. 497; *Godfrey v. Pullman Co.*, 69 S. E. 666. (4) A common carrier cannot limit its common-law liability by a mere notice, whether read

by the passenger or not, nor can it, under any circumstances, limit its liability for loss resulting from its own negligence. *Tibbey v. Railroad*, 82 Mo. 292; *Klass v. Railroad*, 80 Mo. App. 164; *Aiken v. Railroad*, 80 Mo. App. 8; *Wilson v. Railroad*, 21 Grattan (Va.) 654; *Potter v. The Majestic*, 166 U. S. 375; 5 Am. and Eng. Ency. Law 610; 25 Am. and Eng. Ency. Law 1120; 6 Cyc. 388; *The Saratoga*, 20 Fed. Rep. 869.

Guy A. Thompson for respondents.

(1) Where a jury is waived and the issues of fact are submitted to the court, all presumptions are in favor of the correctness of the findings of the court upon the questions of fact involved. *Bond & Stock Co. v. Houck*, 213 Mo. 416; *Gardner v. Robertson*, 208 Mo. 605; *Vincent v. Means*, 207 Mo. 709. (2) Findings of fact made by the trial court in a law case tried without a jury are the equivalent of a verdict of a jury and, if supported by substantial evidence, must be accepted as filed by the appellate court. And this is true even though the appellate court might be of the opinion that the finding of the trial court was against the weight of the evidence. *Glade v. Ferd*, 131 Mo. App. 164.

REYNOLDS, P. J.—Plaintiff in this case, with his wife, was a passenger on a steamboat owned by defendants, the boat operated in the carrying of passengers and freight along the Mississippi river between the ports of St. Louis, Missouri, and Memphis, Tennessee. According to the testimony of plaintiff, when he boarded the boat he had about \$140 in bills in his possession. After paying for the passage of himself and wife for the round trip from Memphis to St. Louis, he had \$115 in paper and a dollar and some odd cents in silver. He testified that he placed

the bills in a wallet, which closed with a snap catch, and after placing the bills in it, he put a rubber band around it, putting the wallet in the left hip pocket of his trousers. On retiring for the night he counted over this money, saw that it was in the wallet, closed the wallet, put the rubber band around it, placed the wallet in his trousers pocket, laid his coat on the lower berth of the stateroom, put his trousers on top of his coat, his vest on top of his trousers and placed all of them on the lower berth, and at the end toward the cabin of the boat. There was a panel door at that end of the stateroom which led from the stateroom into the cabin. Plaintiff locked that door and hooked the screen or lattice door which led from his stateroom to the outer guards or deck. This was an ordinary lattice door, fastened on the inside by a hook and eye. The stateroom was also furnished with a panel door on that side but as it was a warm night in June plaintiff did not close this panel door, being satisfied to hook the screen door. Plaintiff and his wife occupied the upper berth. He got up about seven o'clock the next morning, dressed himself, went out to the forward part of the boat and down on the lower deck and according to his custom, as he testified, took out his wallet, opened it and found that all the money which had been in it was gone. He notified the purser and the latter notified the captain of the boat, but the money was not found.

Plaintiff accordingly brought suit for the amount before a justice of the peace, suing by attachment on the ground that defendants were nonresidents of the state. Defendants appearing, the attachment was dissolved. From a judgment in favor of defendants before the justice, plaintiff appealed to the circuit court where the cause was tried anew before the court, a jury being waived. At the conclusion of the testimony in the case the trial court found for defendants.

Plaintiff and his wife testified, the latter by deposition, and under the provisions of what is now section 6359, Revised Statutes, 1909, permitting the wife to testify in actions against carriers so far as relates to the loss of property and the amount and value thereof, both testifying to the fact of the money being in possession of plaintiff when they retired and of plaintiff's experiment on this screen door, which, according to their testimony, could be unlatched by a person lying outside on the deck and reaching his arm up through an opening in the lower part of the door and unfastening the hook, plaintiff's theory being that some person about the boat had done this and in that way gotten into the room, taken his wallet out of his pocket, removed the money from it, refastened the wallet, placed it back in his pocket and got out of the room without disturbing plaintiff or his wife. The testimony on the part of defendants was to the effect that it was impossible for the loss to have occurred in the manner in which plaintiff testified; that it was impossible for any one to have reached up to the latch in the screen door through the hole in the bottom of it.

At the conclusion of the trial plaintiff asked five instructions or declarations of law. The court gave four of them and refused one. The instruction given at the instance of plaintiff correctly stated the law as to the liability of a common carrier for the care and safety of the ordinary baggage of a passenger, declaring as a matter of law that a common carrier could not exempt itself from liability for loss of valuables taken by a passenger to his stateroom and that such regulation is unreasonable "as to such articles of necessity and convenience as are usually carried by the passenger and does not relieve the carrier from liability for the loss of same occurring by reason of his failure to exercise reasonable care for the protection of such valuables, unless the loss occurred through

the negligence of the passenger, and that failure on the part of the passenger who has seen such a notice, to deliver such articles of convenience and necessity to the exclusive control of the carrier, does not constitute negligence on his part."

The relevancy of this instruction and of others covering the matter of notice arose from the introduction in evidence by defendants of two notices which it was testified had been posted up in the stateroom of plaintiff, to the effect that defendants, owners of the line of steamers to which this one belonged, would not be responsible for valuables or personal belongings of the passengers while on board; that valuables should be deposited in the office safe and that passengers must not leave valuables in their staterooms but must put the same with the clerk in the office. The court further declared that if it found from the evidence that plaintiff retained in his possession in his stateroom only such a sum of money as was a reasonable amount for him to carry, taking into consideration his station in life, the length of his journey and the purposes for which it was made, then plaintiff had a right to retain such sum in his possession in his stateroom, notwithstanding he may have seen the notices above referred to and that defendants are liable for the loss of the same occurring on account of their failure to use reasonable care to protect that sum from loss, provided the loss was not due to the negligence of plaintiff. Plaintiff had testified as to his condition and circumstances and that the money he had was the amount usually carried by him to meet current traveling expenses of the length and character of the trip upon which he and his wife were embarked. The refused declaration defined the term baggage as meaning such articles of necessity and convenience as travelers usually carry for their personal use, instruction or amusement, having regard to the length of their journey, the purpose for which it is made, the position

in life and occupation of the traveler, and includes not only clothing but jewelry ordinarily worn by the traveler and his expense money for the journey. Defendants asked no declarations of law and the court gave none of its own motion, merely finding for defendants. On the finding and judgment being rendered for defendants, plaintiff filed his motion for a new trial and that being overruled and saving exception, brought the case here by appeal.

We have read all of the testimony in the case and on consideration of that and of the declarations of law given as well as that refused, find no reason to disturb the finding of the learned trial court. He had the principal witness before him; had before him substantial testimony warranting him in finding that plaintiff's loss was occasioned by his own negligence, and his action in passing upon the declarations of law asked shows that he clearly and correctly understood the principles of law applicable to a case of this character. The declaration of law which was asked by plaintiff and which the court refused was correctly refused. The law announced in it was correctly given in another instruction, of which we have given a summary. The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

LOUIS H. HESPOS, Appellant, v. ADOLPH E. WINKELMEYER et al., Respondents.

St. Louis Court of Appeals, July 19, 1912.

1. **CONTRIBUTION: Prima Facie Case: Defenses: Burden of Proof.** In an action for contribution on a judgment rendered against plaintiff and defendant on a promissory note executed by both of them, plaintiff would make a prima facie case by proving that a judgment was rendered on the note against him and defendant, and that he had paid it in full; and the burden would then rest upon defendant to establish a defense that the note was given for money borrowed by plaintiff alone.

Hespos v. Winkelmeyer.

2. **PLEADING: Proof: Variance.** In an action in equity for contribution, on the ground of joint liability of plaintiff and defendant on a judgment rendered against them on a promissory note, which judgment had been discharged by plaintiff, a recovery could not be had on proof that plaintiff signed the note merely as surety for defendant and that the latter was, therefore, liable for the full amount of the judgment, since one cannot sue on one cause of action and recover on another, and the cause of action counted on was in equity, while the proof disclosed a cause of action at law.

Appeal from St. Louis City Circuit Court.—*Hon.*
Moses N. Sale, Judge.

AFFIRMED.

Julius T. Muench for appellant.

(1) A court of equity has jurisdiction, at the suit of those parties to a joint liability who have discharged to the obligee the whole liability, to bring in those who have not contributed their share and to require them to make contribution; and to make an amicable adjustment of the burden among the parties and settle the whole controversy in one suit. *Dysart v. Crow*, 170 Mo. 275. (2) The judgment rendered in the *Knabner* suit, with the further evidence that appellant had alone discharged the same, was sufficient to make out a *prima facie* case against the respondents. *Dent v. King*, 1 Ga. 200; *Wolters v. Henningson*, 114 Cal. 433; *Dupuy v. Johnson*, 1 Bibb (Ky.) 562.

F. A. & L. A. Wind and *W. H. Allen* for respondents.

(1) A party cannot sue on one cause of action and recover on another. *Clemens v. Yeates*, 69 Mo. 623; *Reed v. Bott*, 100 Mo. 62; *Henry County v. Bank*, 208 Mo. 209; *Mason v. Railroad*, 75 Mo. App. 1; *Real Estate Co. v. Hotel Co.*, 202 Mo. 605. (2) While a plaintiff may have other and different relief from that prayed for, the decree which is awarded him must be warranted both by the facts stated in the petition

and by the proof. *Newham v. Kenton*, 79 Mo. 382; *Baldwin v. Whaley*, 78 Mo. 186; *Ross v. Ross*, 81 Mo. 84. (3) Where a plaintiff specifically alleges in his petition a given state of facts, as constituting his cause of action, he can recover only upon the theory adopted in his pleading. *Wernick v. Railroad*, 131 Mo. App. 37; *Haynor v. Excelsior Springs*, 129 Mo. App. 698. (4) Whether there is a change of cause of action is determined by two tests. 1st. Whether the same evidence will support both. 2d. Whether the amount of recovery is the same. *Burnham v. Tillery*, 85 Mo. App. 453; *Liese v. Meyer*, 143 Mo. 547; *Griegsby v. Martin*, 169 Mo. 221; *Scovill v. Glasner*, 79 Mo. 449; *Santer v. Leveridge*, 103 Mo. 621; *Holt v. Cannon*, 114 Mo. 519.

REYNOLDS, P. J.—This is a suit by appellant, plaintiff, against respondents for contribution, on the ground of the joint liability of plaintiff and defendants upon a promissory note for \$1000, judgment upon which note had been rendered in the circuit court upon a stipulation signed by the holder of the note, the plaintiff in that suit on the one side, and by appellant and respondents herein on the other side. Execution issuing on the judgment, levy was made alone upon the property of the plaintiff to pay the whole of it, which he, or someone in his behalf did, and these defendants failing to pay this plaintiff their proportionate shares, two-thirds, as he claimed, he brought this suit, as one in equity, for contribution. The petition, setting out the execution of the note by the three parties, the rendition of the judgment against them and the payment of it by plaintiff here under the execution levied against his property, prays that an adjustment of the joint liability on the judgment between plaintiff and the defendants upon the basis of an equal division between the appellant and both the respondents be had, if both are financially responsible, or between

the appellant and one of the respondents, if only one of them is financially responsible.

The joint answer of the defendants, after denying the allegations of the petition, sets up that the money for which the joint note was given and upon which the judgment was rendered was really borrowed for the appellant alone and used by him for his own purposes.

A general denial by way of reply was filed to this new matter in the answer.

The cause was tried before the court as in equity. The only witness whose testimony was heard in the case was that of plaintiff himself. After making formal proof of the judgment and of the issue of the execution and satisfaction of it and introducing the note in evidence signed by plaintiff and the two defendants, plaintiff, testifying in chief, gave his version of the circumstances under which he claimed the note in question, had been executed by him and the defendants. He testified, in effect, that the note was executed in contemplation of the organization of a corporation by him and defendants for the manufacture and sale of washing machines; that a contract to this effect was entered into between them, the exact terms of which are not in evidence, but that the corporation was never organized. He further testified that when the note was executed, defendants were engaged in selling these washing machines, which he was manufacturing for them; that defendants needed funds in this business and the \$1000 represented in the note was borrowed solely for the benefit of the two defendants, Winkelmeier and Meyer, and that he (plaintiff) was merely an accommodation maker on the note, having negotiated for the money with the lender, who required him to sign the note with the other two parties as makers. In testifying plaintiff admitted that he had himself received and paid out all of this \$1000 raised on this note but he testified that it was done for and

solely on behalf of the business of the defendants, who he testified were the sole partners in the concern doing business under the name of Sugar Plum Washing Machine Company, as partners, under that name being engaged in selling these machines, plaintiff merely manufacturing them for defendants at specified prices.

Letters were introduced and read in evidence written by plaintiff, from which it appeared that he, while nominally the bookkeeper of the partnership composed of the two defendants, in point of fact controlled the action of Meyer, who under the articles of partnership between Meyer and Winkelmeyer was the salesman for the firm, these letters indicating that plaintiff exercised complete authority over Meyer as to his sales, movements, commissions, compensation, etc., but in no manner asserting any interest in the partnership by plaintiff. These facts developing, counsel for defendants suggested to the court that the proof, as made by plaintiff's own testimony, developed and showed an entirely different cause of action than that stated in the petition. They claimed that the cause of action stated in the petition was clearly one for contribution, upon the allegation as to the joint liability of the plaintiff and defendants on the note, and the alleged right of plaintiff to have the defendants contribute proportionately to the payment of the judgment on the note, while plaintiff's own testimony showed that his cause of action, if any, should be for the entire amount of the note, interest, etc., as money borrowed by him and defendants, but entirely for the benefit of defendants and paid out by him for these defendants. As appears by the abstract of the record of the proceedings at the trial, the court adopted this position taken by counsel for defendants. Quoting the language of counsel for plaintiff in his brief filed, "upon the trial the court took the position that the appellant, by his own testimony, indicated that, instead of having been borrowed for their joint

benefit, the money for which the note was given had really been borrowed for the respondents alone, to be used in connection with a partnership existing under the name of 'Sugar Plum Washing Machine Company,' and that, in view of appellant's own testimony, he would be entitled, if he could recover at all, to recover from the respondents jointly the whole of the judgment he had been required to pay. The court then further took the position that this would require a proceeding of a different nature from that instituted by appellant and that he could not recover, in his present action, the whole of the sum expended." So counsel for appellant states the case. It is further set out in this statement of counsel that the court declined to allow appellant to proceed upon the theory which counsel advanced, that even if entitled to the whole amount expended, plaintiff would at least be entitled to recover the part sued for, if willing to waive the remainder. The abstract shows that the court held that on the facts in evidence plaintiff could not recover any amount under the averments in his petition, and announced that it seemed useless for plaintiff, in view of this, to proceed further, as the court would be compelled to find the issues in favor of defendants. Whereupon plaintiff, by leave of court, took a nonsuit with leave to move to set the same aside. This motion was afterwards interposed, overruled, exception duly saved and the cause brought here by plaintiff on appeal.

Learned counsel for appellant make two propositions: First, that a court of equity has jurisdiction, at the suit of those parties to a joint liability who have discharged to the obligee the whole liability, to bring in those who have not contributed their share and to require them to make contribution and to make an amicable adjustment of the burden among the parties and settle the whole controversy in one suit. Second, that the judgment rendered in the Knabner suit, that is the suit on the note, with the further evidence that

appellant had alone discharged the same, was sufficient to make out a *prima facie* case against the respondents.

Taking up this second proposition, it may be conceded to be true. If plaintiff had closed his case there he would have thrown upon defendants the onus of overcoming it. He did not choose to do this, however, but in the language of the abstract prepared and filed with us by his counsel, "anticipating the defenses raised by the answer of the defendants, the witness (plaintiff) testified." Whereupon followed the testimony by plaintiff himself which the learned trial court held disclosed a state of facts utterly inconsistent with those stated as the cause of action and which really disproved those averments.

The authority cited for the first proposition by counsel for appellant is *Dysart et al. v. Crow et al.*, 170 Mo. 275, 70 S. W. 689. It is said in that case (l. c. 280), that the real point in dispute in the case was whether a court of equity has jurisdiction, at the suit of some of the parties to a joint liability, who have discharged the whole burthen, to bring in the others to require them to make contribution and to effect an equitable adjustment of the burthen and settle the whole controversy in one suit. Plaintiff's petition, in the *Dysart* case, was bottomed on the theory that a court of equity has that jurisdiction, the defendants contending that the plaintiff's only remedy was at law. Judge VALLIANT delivering the opinion of the court, holds that such a cause of action, one seeking contribution, is more effectually dealt with by a court of chancery than by one at law.

The opinion and decision in the *Dysart* case falls far short of holding that under the guise of a suit for contribution, a plaintiff can recover for a claim which he has against the defendant or defendants for money paid out by him solely on account of defendants, the obligation to repay all of it to plaintiff resting on de-

fendants. That is the case here. According to the plaintiff's own testimony, this is not a case for contribution. His cause of action stated being upon the theory of a right to contribution, one in which contribution is sought, cannot be converted into an action at law, pure and simple, against the defendants for money had and received, or for money paid out by plaintiff for the use and benefit and at the request, express or implied, of the defendants. That would be an action at law pure and simple. This is the view the learned trial court took of the case.

Learned counsel for appellant argues that one has a right to bring his action for less than he is entitled to recover. That is unquestioned, but does not meet this case. The petition proceeds on the theory that the relations between plaintiff and defendants were such that on payment of the joint debt by one, that one has a right of contribution from the others. The petition has no other aspect or theory; it seeks contribution; a right enforceable at law or in equity (*Dysart v. Crow*, *supra*), and here plaintiff proceeds in equity. In the case at bar plaintiff's own testimony conclusively proves that there is no right of contribution involved; no equities to be adjusted between the parties. His is a case, as proved by his own testimony, of money paid out by him, not for the use of himself and others, but solely for those others; in short, his cause of action proved is one where the money advanced by him, if recoverable at all, is recoverable solely in an action at law. His case as pleaded, is one in equity, for contribution. It has long since been settled in our state that a party cannot sue on one cause of action and recover on another. That is what plaintiff here seeks to do and the learned trial court very correctly held that he could not do so; could not maintain this suit. In this we think that court was right. The judgment should be and is affirmed. *Nortoni and Caulfield, JJ.*, concur.

EMMA KLAGES, Respondent, v. AMELIA
MUELLER, Appellant.

St. Louis Court of Appeals, July 19, 1912.

1. **APPELLATE PRACTICE: Review of Admission of Deposition: What Record Must Show.** To review the admission of a deposition, over the objection that there was nothing to show the witness was out of the court's jurisdiction, the whole deposition, including the certificate of the officer taking it, must be preserved in the record.
2. **INSTRUCTIONS: Commentary on Evidence.** In an action on a promissory note, the execution of which was denied by defendant under oath, the court instructed the jury that, in determining whether or not the signature was genuine, they were not bound to consider the testimony of defendant on that issue as controlling or conclusive, but they should consider her testimony in connection with all the other testimony bearing on the matter, and if, from all the facts and circumstances in evidence, they were reasonably satisfied that defendant signed the note, they should find for plaintiff. *Held*, that the instruction correctly declares the law and is not objectionable as unduly commenting on the evidence.
3. ———: ———. In an action on a promissory note, the execution of which was denied by defendant under oath, where plaintiff's testimony was given by deposition, the court instructed the jury "that certified copies of public records are entitled to the same consideration as the records themselves and that depositions read in evidence are to be considered and given the same weight as statements made by witnesses therein as if they had personally appeared at the trial and testified in accordance with the deposition." *Held*, that the instruction correctly declares the law and is not objectionable as unduly commenting on the evidence.
4. **BILLS AND NOTES: Action on Note: Instructions.** In an action on a promissory note, the execution of which was denied by defendant under oath, a series of instructions given for plaintiff, epitomized in the opinion, are *held* to correctly declare the law and to be free from containing any undue comments on the evidence.

CAULFIELD, J., dissents.

Appeal from St. Louis County Circuit Court.—*Hon.*
G. A. Wurdeman, Judge.**AFFIRMED.**

Zach J. Mitchell for appellant.

(1) The deposition of plaintiff offered herein was erroneously admitted in evidence against the objections and exceptions made and saved by defendant at the trial herein. Depositions shall be accompanied by certificate of the official character of the officer taking them, etc. R. S. 1909, sec. 6408. All the requirements of the law in respect to taking depositions must be complied with before they can be read in evidence. *Patterson v. Fagin*, 38 Mo. 70; *Perry v. Siter*, 37 Mo. 274; *Minche v. Skinner*, 44 Mo. 92. Proof of depositions when witness is absent from the state, must appear at time of trial by other evidence than that contained in the deposition. *Levermore v. Eddy*, 138 Mo. 547; *Gall v. Wenger*, 19 Mo. 542; *Grinnan v. Mockbie*, 29 Mo. 345. (2) Instruction No. 2 is objectionable as a comment upon the affidavit and testimony of appellant herein and said instruction No. 3 is also objectionable as a comment upon the testimony by deposition of respondent herein. *State v. Howard*, 118 Mo. 127; *Greenleaf on Evidence* (7 Ed.), 520; *Starkie on Evidence* (9 Ed.), 766.

William H. Davies for respondent.

(1) All presumptions are in favor of the proceedings and the rulings of the trial court, and unless the whole deposition, including the certificate of the officer taking it, is preserved in appellant's record, it is presumed that the certificate discloses a proper cause for reading it. *Sullivan v. Railroad*, 97 Mo. 113; *Vaughan v. Railroad*, 34 Mo. App. 141; *Walter v. Cathcart*, 18 Mo. 256. (2) There is no statute or rule of law pronouncing testimony by deposition inferior to oral testimony. R. S. 1909, sec. 6384 *et seq.*; *Moore on facts*, sec. 964; *Elliott's General Practice*, sec. 338; *State v. Grant*, 79 Mo. 137; *Works v. Stevens*, 76 Ind. 181; *Miller v. Elgin*, 64 Ind. 197. (3)

Even where evidence is admitted or instructions given which might be properly refused, reversal is not thereby justified unless the merits of the action have been materially affected. R. S. 1909, sec. 2082; *Sinclair v. Bradley*, 52 Mo. 180; *Fitzgerald v. Barker*, 96 Mo. 661.

REYNOLDS, P. J.—This action was commenced before a justice of the peace, the action founded on a note alleged to have been executed by defendant in favor of plaintiff. We are not advised by the abstract which of the parties recovered in the justice's court. At any rate, the cause was appealed to the circuit court and there tried before the court and a jury. The issue there was over the fact of the execution of the note by defendant, defendant having challenged the execution by affidavit denying that fact.

It appears that plaintiff herself was absent from this country at the time of the trial, being in Germany, and her deposition, taken there, was admitted in evidence over the objection of counsel for defendant. There was testimony on the part of plaintiff outside of the deposition, tending to show that plaintiff was absent from this country at the time of the trial; that defendant had admitted the execution of the note and that she had not paid it. On her behalf defendant denied that she had executed the note and two or more witnesses testified that to the best of their knowledge and belief the signature attached to the note was not that of defendant. Papers pertaining to and of the files in the case, executed by defendant, were in evidence.

At the instance of plaintiff the court gave five instructions. The first is to the effect that if the jury believed from the evidence that the note in question was executed by defendant, they should find for plaintiff and assess her damage at the amount of the note, specifying it, with interest at the rate of six per cent

per annum from February 10, 1902. The second instruction told the jury, in effect, that in determining the issue of whether or not the signature of defendant appearing on the note in evidence was her genuine signature, the jury were not bound to consider the testimony of defendant herself on that issue as conclusive or controlling, but they should consider her testimony in connection with that of all the other testimony in the case bearing on that matter, and if from all the facts and circumstances developed in evidence the jury were reasonably satisfied, from the greater weight of the credible evidence, that defendant signed her name to the note, their verdict must be for plaintiff. Another instruction told the jury, in effect, that certified copies of public records are entitled to the same consideration as the records themselves and that depositions read in evidence are to be considered and given the same weight as statements made by witnesses therein as if the they had personally appeared at the trial and testified in accordance with the deposition. Another instruction told the jury that they were the exclusive judges of the facts proven, the credibility of the witnesses and the weight to be given their testimony. The final instruction was as to the number of jurors necessary to concur in a verdict. These were all excepted to by defendant.

Defendant asked no instructions and the court gave none of its own motion.

The jury returned a verdict in favor of plaintiff for the amount of the note and interest. In due time defendant filed her motion for a new trial and saving exceptions to that being overruled duly perfected her appeal to this court.

We are unable to discover any reversible error in this record.

We cannot go into the question of the action of the court as to the admission of the deposition in evidence for the reason the deposition and its certificates

are not contained in the abstract. Our Supreme Court held, in *Sullivan v. Missouri Pac. Ry. Co.*, 97 Mo. 113, l. c. 121, 122, 10 S. W. 852, that where the certificate of the officer taking the deposition is not preserved in the record, the appellate court must indulge in the presumption that the trial court, having admitted the deposition to be read in evidence, had before it a certificate entitling that deposition to be read; that the whole deposition, including the certificate of the officer, must be preserved in the record in order to enable an appellate court to review such an objection as made in the present case.

We do not think the objections urged to the instructions are tenable. They were neither undue comments on the evidence nor incorrect statements of the law.

The case was one entirely for the jury on the sole fact of execution of the note in question by the defendant; the jury had before it all the testimony concerning this matter. We hold they were properly instructed and their verdict is conclusive.

The judgment of the circuit court is affirmed. *Nor-toni J.*, concurs. *Caulfield, J.*, dissents.

HATTIE M. KINGSLEY, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, May 27, 1912.

1. **NEGLIGENCE: Evidence: Injured on Sidewalk.** In an action for personal injuries it is reversible error to permit plaintiff to prove the number and ages of the members of his family, unless such evidence is pertinent to one of the issues contested by the parties.
2. ———: ———: **Condition of Health.** Where it is contended that the condition of plaintiff's health was not due to her injury but to the congenital imperfection and weakness of her procreative organs or to some disease, then it is proper to show her previous good health and that she had borne healthy children.

Kingsley v. Kansas City.

3. ———: **Misconduct of Counsel: Rebuke by Court.** Attorneys should keep their flights of eloquence and their invectives and insinuations within the limits of the issues of the case, and where they transgress such bounds the trial court should administer a fitting rebuke—one that would cure the error.
4. ———: **Instructions: Time to Repair.** An instruction which correctly defines the rule giving municipalities reasonable time after receiving actual or constructive knowledge of a defect, in a sidewalk, in which to make the necessary repairs, is not erroneous.
5. ———: **Verdict not Excessive: Injuries Permanent.** A verdict for five thousand dollars is not excessive where the evidence shows plaintiff, a woman forty-one years old in previous good health, was injured in a most painful and serious manner and will be a pain-racked invalid the rest of her life, afflicted with an offensive, annoying and humiliating malady.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas, Judge.*

AFFIRMED.

John G. Park, J. W. Garner and F. M. Hayward
for appellant.

(1) The court below erred in admitting evidence of the number and ages of plaintiff's children. *Williams v. Railroad*, 123 Mo. 573; *Stephens v. Railroad*, 96 Mo. 217; *Dayhard v. Railroad*, 103 Mo. 570; *Mahoney v. Railroad*, 108 Mo. 191; *Railroad v. Powers*, 74 Ill. 341; *Shaw v. Boston*, 8 Gray (Mass.) 45; *Railroad v. Books*, 57 Pa. St. 339; *Crouse v. Chicago, etc.*, 102 Wis. 196; *Penn. Co. v. Roy*, 102 U. S. 451. (2) The court erred in permitting counsel for respondent without rebuke to assert to the jury that it was the duty of counsel for appellant to win the case by any means he could. *Gibson v. Zeibig*, 24 Mo. App. 65; *Norton v. Railroad*, 40 Mo. App. 642; *McDonald & Co. v. Cash*, 45 Mo. App. 66; *Ensor v. Smith*, 57 Mo. App. 584; *Thompson v. Bernays*, 85 Mo. App. 575; *Harper v. Telegraph Co.*, 92 Mo. App. 304; *Schutte v.*

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Transit Co., 108 Mo. App. 21; Beck v. Railroad, 129 Mo. App. 24. (3) The court erred in giving instruction 1-P in not instructing the jury that defendant was entitled to a reasonable time after knowledge of defect in the sidewalk to repair such sidewalk. Pearce v. Kansas City, 156 Mo. App. 230; Ballard v. Kansas City, 126 Mo. App. 541; Richardson v. Marcelline, 73 Mo. App. 360; Plummer v. Milan, 79 Mo. App. 439; Ball v. Neosho, 109 Mo. App. 683; Maus v. Springfield, 101 Mo. 613; Badgley v. St. Louis, 149 Mo. 122; Young v. Webb City, 150 Mo. 333; Bautian v. Young, 152 Mo. 317. (4) The verdict is excessive, the result of passion and prejudice. Collins v. Jamesvill, 107 Wis. 437.

Brewster, Kelley, Brewster & Buchholz for respondent.

JOHNSON, J.—Plaintiff recovered a judgment for \$5000, for personal injuries she alleges in her petition were caused by the negligence of defendant in failing to maintain a public sidewalk in reasonable repair. Defendant appealed and its counsel attack the judgment on four grounds, viz.: *first*, that the court erred in admitting evidence of the number and ages of plaintiff's children; *second*, that the court allowed improper remarks to the jury made in the closing argument of plaintiff's counsel to stand unrebuked; *third*, that the first instruction given at the request of plaintiff was erroneous in not allowing defendant a reasonable time to repair the alleged defect after receiving actual or constructive knowledge of its existence; and, *fourth*, that the verdict is so excessive as to compel the conclusion that it is the product of passion and prejudice. The injury occurred at night February 15, 1910, on the sidewalk on the east side of Washington street between Seventh and Eighth streets in Kansas City.

Plaintiff, a stout woman forty-one years old, was walking on the sidewalk in the company of her husband, when she stepped in a hole caused by the absence of brick that had become loose and displaced and fell heavily to the sidewalk, sustaining the injuries of which she complains. The evidence of plaintiff tends to show that the defect had existed for more than three months and that the city had been given actual notice thereof before the injury in ample time to have repaired the place had reasonable care been exercised. Before the injury plaintiff weighed 189 pounds, was strong and in good health and had borne three children, the youngest of which was ten years old. Her fall produced no broken bones but severely bruised her back and hips. She was carried into her home which was nearby and on the way exhibited symptoms of severe shock. She had a profuse hemorrhage from the uterus and it was found afterward that this organ had become retroverted and inflamed and that other internal organs, the ovaries, Fallopian tubes and kidneys, were inflamed, swollen and diseased. In addition to the great pain caused by such condition, incontinence of urine has resulted. The expert evidence of plaintiff is to the effect that this condition is permanent, can be relieved only by a major operation of the gravest nature and that if unrelieved, plaintiff will be a hopeless invalid the remainder of her life.

The evidence of defendant pictures the condition of plaintiff in far less gloomy colors and there is expert evidence tending to show that her ill health is not the result of traumatism but is due to climacteric or organic causes or to the ravages of disease. Defendant endeavored to prove that plaintiff had suffered three miscarriages before her injury, was in ill health and was undergoing one of the important sexual changes peculiar to women. A deposition of plaintiff taken by defendant before the trial was read in evidence and discloses that defendant's counsel inter-

rogated plaintiff about the number and ages of her children and the state of her health prior to the injury. In the cross-examination of plaintiff at the trial counsel for defendant asked, "How many miscarriages had you prior to this? A. I had none. Q. Didn't you have three? A. No, sir. Q. Never had any miscarriages prior to this accident? A. Never did."

We quote from the testimony of a physician appointed by the court to examine plaintiff, elicited by counsel for defendant:

"Now, Doctor, I will ask you to state from your examination of her and the conditions that you found there what did you determine as to the conditions there and the length of time and so on? A. Well, I found a condition that could come from a considerable number of causes, and as to the length of time, no one could really honestly say. Q. Did it look like it was one of long standing or not? A. More than likely to be. Q. You said it could have come from many causes. What were those causes? A. Inflammation following child bearing, miscarriages, gonorrhea, and other infections of the womb. Q. Could the conditions you have found there come from even uncleanness? A. I think not."

"In the direct examination of plaintiff she was asked, "How many children have you? A. Three. Q. Are they living? A. Yes, sir. Q. Are they single or married? A. One of them is married."

Defendant objected and moved that the testimony be stricken out. Counsel for plaintiff said, "I want to ask it bearing upon the condition of her health." The court overruled the objection and motion and that ruling is the subject of the first point urged by defendant for a reversal of the judgment.

The rule is well settled in this state that in an action for personal injuries it is reversible error to permit the plaintiff to prove the number and ages of

the members of his family. [Williams v. Railway, 123 Mo. 573; Stephens v. Railroad, 96 Mo. 207; Dayharsh v. Railroad, 103 Mo. 570; Mahaney v. Railroad, 108 Mo. 191.] The reason of the rule is apparent. Ordinarily such evidence is irrelevant to any issue in the case and the only purpose it could have would be to excite and inflame the jury and thereby to enhance the assessment of damages. But the rule should not obtain in cases where such evidence is pertinent to one of the issues contested by the parties. Defendant tendered the issue that plaintiff's condition of ill health was not due to her injury but to the congenital imperfection and weakness of her procreative organs or to some disease. The attempt to show that repeatedly she had suffered miscarriages was addressed to this issue as was the expert evidence that her condition might have been caused by a natural or diseased affection of her organs that would manifest itself by the inability to bear children. The facts, if they were facts, that she had been in apparent good health and had borne healthy children, had a direct bearing on the issue we are discussing, since they tended to show that her genital organs were normal and healthy at the time of her injury. The evidence was properly admitted.

In his closing argument to the jury one of plaintiff's counsel said, in substance: "Whenever any city employee has been guilty of negligence it then becomes the duty of Mr. Garner as the representative of the legal department of the city to proceed to win his case by any means he can." Counsel for the city said: "I object to that statement, if your honor please, and ask that the jury be discharged on account of it."

Counsel for plaintiff: "What statement?"

Counsel for defendant: "That it is Mr. Garner's duty to win a case by any means that he can, as being entirely improper. There has not been any effort

made here or anything to indicate anything of the kind."

Counsel for plaintiff: "It seems to me that is a frivolous objection."

Counsel for defendant: "I object to that statement, that an objection that I make is a frivolous objection, and I again renew the motion to discharge the jury on account of the misconduct of both the Mr. Brewsters."

The court: "Overruled."

It is the duty of attorneys to keep their flights of eloquence and their invectives and insinuations within the limits of the issues of the case and where they transgress such bounds the trial court should administer a fitting rebuke—one that would cure the error. As to what constitutes a transgression something must be left to the discretion and judgment of the trial judge who hears the utterance and can note its apparent effect on the minds of the jury. Evidently the learned trial judge did not think the language called in question was intended to convey an insinuation of impropriety on the part of the counsel for the defendant or was understood by the jury as impugning reprehensible conduct. Counsel for defendant was entirely too sensitive and too keen to put an evil construction on an expression the context shows was innocently uttered.

We find the objection to the first instruction given at the request of plaintiff is not well founded. The jury were instructed that "if they find and believe from the evidence that the defendant knew, or by the exercise of ordinary care, could have known of said dangerous and unsafe condition of said sidewalk, if the jury believe from the evidence that the condition of said sidewalk was dangerous and unsafe in time, by the exercise of ordinary care, to have repaired said sidewalk," etc.

This was a correct definition of the rule which gives a municipality reasonable time after receiving actual or constructive knowledge of the defect in which to make the necessary repairs. [Pearce v. Kansas City, 156 Mo. App. 230; Ballard v. Kansas City, 126 Mo. App. 541; Richardson v. Marceline, 73 Mo. App. 360; Plummer v. Milan, 79 Mo. App. 439; Ball v. Neosho, 109 Mo. App. 683; Maus v. Springfield, 101 Mo. 613; Badgley v. St. Louis, 149 Mo. 122; Young v. Webb City, 150 Mo. 333; Baustian v. Young, 152 Mo. 317.]

We do not believe the verdict is excessive. If plaintiff's evidence is to be believed, and its credibility was an issue for the jury to determine, she was injured in a most painful and serious manner and the consequences of her injury are such that she will be a pain-racked invalid the rest of her life, afflicted with an offensive, annoying and humiliating malady. For such injuries the assessment of damages given in the verdict is not too great.

The judgment is affirmed. All concur.

SARAH L. COLLINS, Appellant, v. TOOTLE
ESTATE, Respondent.

Kansas City Court of Appeals, June 17, 1912.

1. **NEGLIGENCE: Injuries on Stairway.** Defendant and another owned adjoining two-story buildings having a common stairway leading to the second floor. Plaintiff was the tenant of the latter and was injured by a fall upon the stairway. The roof over the stairway leaked and ice accumulated upon the steps, and caused plaintiff to fall. Each owner claimed and was in possession of the roof over his building. Plaintiff's landlord, some time before the accident, put a new tin roof on its building, including the roof over half of the stairway, but this did not stop the leak. Water from the leak continued to fall principally from the middle of the stairway. *Held*, that as it was, under the evidence, as reasonable to infer that the

defect was in the roof of the adjoining building as that of the defendant, the demurrer to the evidence was properly sustained.

2. ———: Demurrer to Evidence: Jury. Where evidence presents two or more probable causes of an injury for one of which defendant would be liable and not for the others, the jury should not be allowed to make a capricious selection from such probabilities.

Appeal from Buchanan Circuit Court.—*Hon. W. K. Amick, Judge.*

AFFIRMED.

G. L. Zwick and C. C. Crow for appellant.

R. A. Brown for respondent.

JOHNSON, J.—Plaintiff commenced this suit against the Tootle Estate, a corporation, Maggie Morris and others to recover damages for personal injuries alleged to have been caused by the negligence of defendant. At the first trial plaintiff dismissed all of the defendants but the Tootle Estate. Issues of fact were submitted to the jury and a verdict for the remaining defendant was returned. Plaintiff appealed and we reversed and remanded the cause because of error in the instructions to the jury. [156 Mo. App. 221.] After the cause was returned to the circuit court plaintiff filed an amended petition in which she alleged that her injury was caused by the negligence of defendant in not repairing the roof over the stairway on which plaintiff fell and was injured and in not providing the stairway with a railing or handhold. In addition to a general denial the answer pleaded contributory negligence and the further defense that the negligence of which plaintiff complains, if it existed at all, was the negligence of defendant's lessee for which defendant should not be held accountable. The cause was tried a second time and at the conclusion

of all the evidence the court gave an instruction in the nature of a demurrer whereupon plaintiff took an involuntary nonsuit with leave and in due course of procedure brought the case here by appeal.

We shall state the evidence in its phase most favorable to the cause of action asserted. The Tootle Estate and the Morris Estate owned adjoining buildings on Francis street in St. Joseph. The buildings were alike in size and design, were two stories high and each was occupied by tenants. The Tootle building was in the possession of a tenant whose lease from defendant imposed no duty on defendant to keep the building in repair. This tenant used the first floor for business purposes and sublet the second floor for office and living rooms. The first floor of the Morris building was occupied by a tenant as a place of business and the second floor was occupied by plaintiff and her husband as tenants of the Morris Estate, and had been so occupied for five years or more before the injury. A common stairway about four feet wide ascending from Francis street to the second floor afforded the means of ingress and egress to the occupants of that floor. Half of this stairway was in the Tootle building and half in the Morris building. The buildings were old and the stairway had been there so long that we shall assume for the purposes of this case that the owner of each building had acquired a prescriptive right to the use of the whole stairway and that this right inured to the tenants of each. A flat tin roof covered both buildings and provided shelter for the stairway. No part of this roof was owned in common. Each owner claimed and was in possession of the roof over his building to the property line dividing the two buildings and some two or three years before the injury the Morris Estate had put a new tin roof on its building including the roof over the half of the stairway that was on the Morris property. It appears that when plaintiff became a tenant of the Mor-

ris Estate the roof over the stairway leaked and it was partly on account of the complaint of plaintiff that the new roof was put on. This repair, however, did not stop the leaking of the roof, and ice which collected on the lower steps of the stairway in consequence thereof caused plaintiff to fall while descending the stairway and to sustain the injuries of which she complains.

We do not find it necessary to discuss the defense based on the fact that defendant's building was in possession of a lessee and shall treat the case as we would had defendant been in possession. Plaintiff endeavors to put herself in the role of a stranger using the stairway on the implied invitation of defendant, but it is obvious she cannot maintain such position. Her right to the use of the stairway was derived from her landlord, the Morris Estate, and her relation to defendant, so far as such use is concerned, in all respects was the same as that of her landlord. She had a prescriptive right to use the stairway—a right growing out of some sort of contractual relation between the owners of the two buildings at the time they constructed a stairway for their common use. Each owner assumed the obligation of providing a roof over the half of the stairway on his property and thereby became charged with the duty towards his co-owner of exercising reasonable care to provide a sufficient roof over that half of the stairway. A negligent breach of that duty by either owner would render him liable to respond to the other in damages for an injury resulting from such breach. That was the extent of the duty defendant owed the Morris Estate or its tenants. Consequently the burden was on plaintiff to plead and prove that the defect that caused the leak was in the roof maintained by defendant and we find the evidence entirely barren of such proof.

The evidence shows that the water from the leak fell principally on the middle of the stairway and it

is just as reasonable to infer that the defect which caused the leak was in the Morris roof and that its continuance after the replacement of that roof was the result of poor workmanship in making a juncture with defendant's roof as it is to infer that the defect was in defendant's roof. Plaintiff has left the cause of her injury in the domain of conjecture and has brought herself under the ban of the well settled rule that where evidence of the plaintiff presents two or more probable causes of an injury for one of which the defendant would be liable and for the others would not be liable, the jury should not be allowed to make a capricious selection from such probabilities.

These considerations compel the conclusion that the court properly sustained the demurrer to the evidence and relieves us from the task of considering other questions argued in the briefs.

The judgment is affirmed. All concur.

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MARGARET E. JEWELL, Respondent, v. EXCELSIOR POWDER MANUFACTURING COMPANY, Appellant.

Kansas City Court of Appeals, June 17, 1912.

1. **NEGLIGENCE: Master and Servant.** Plaintiff sued for damages for the death of her husband, who was an employee of defendant at its powder plant. It was *held*, that the evidence presents the issue of defendant's negligence as one of fact for the jury to determine.
2. ———: **Evidence: Expert Witness.** An expert is one who is skilled in any particular act, trade or profession, being possessed of peculiar knowledge concerning the same, and where one qualifies as an expert the weight to be given his opinion is an issue for the jury to determine.
3. ———: **Safe Appliances: Purchased from Standard Maker.** Where an appliance furnished by the master is not complicated

or dangerous and is purchased from a reputable and standard maker; minute inspection is not required of the master, but if the appliance is put to a hazardous use, the master must exercise reasonable care to ascertain if it is in a reasonably safe condition for the purpose of its intended use.

Appeal from Jackson Circuit Court.—*Hon. Herman Brumback*, Judge.

AFFIRMED.

Kinealy & Kinealy and *E. W. Taylor* for appellant.

(1) The court erred in admitting Mr. Lemley's conversation with the deceased after the explosion. *Redman v. Railroad* 185 Mo. 11; *Leahy v. Railroad*, 97 Mo. 165; *Dunlap v. Railroad*, 145 Mo. App. 215; *Lee v. Railroad*, 112 Mo. App. 372. (2) The court erred in admitting the testimony of witness, Freeman Bailey, as to the switch and as to the contrivances mentioned in the specifications of negligence set out in the petition. *Turner v. Haar*, 114 Mo. 335; *Graney v. Railroad*, 157 Mo. 666; *Steinhauser v. Sprawl*, 127 Mo. 541; *Berning v. Medart*, 56 Mo. App. 443; *Wilkinson v. Bottling Co.*, 154 Mo. App. 563. (3) The court erred in refusing to instruct the jury to find for the defendant. There was no evidence tending to establish the charges of negligence in the petition and it appeared that Jewell's negligence was certainly a contributory, if not the sole immediate, cause of his death.

Botsford, Deatherage & Creason for respondent.

(1) The court did not err in refusing defendant's demurrer at the close of plaintiff case. *Buesching v. Light Co.*, 73 Mo. 231; *Toohey v. Frivin*, 96 Mo. 109; *Soelder v. Railroad*, 100 Mo. 681; *Connolly v. Press Co.*, 166 Mo. 463; *Jewell v. Powder Co.*, 143 Mo. App. 200. (2) In the absence of evidence to the contrary,

the injured party is presumed to have been in the exercise of ordinary care at the time he received his mortal injuries. *Smily v. Ribo*, 160 Mo. 635; *Miller v. Rybo*, 164 Mo. 198; 16 Cyc. 1057. (3) The court did not err in the admission of the statement of witness Lemley as to what Mr. Jewell said to him (Lemley) as to how the accident occurred, immediately after the explosion and while Mr. Jewell was still burning and on the ground. The statement of Mr. Jewell to Mr. Lemley was clearly a part of the *res gestae*. *Brownell v. Railroad*, 47 Mo. 344; *Harrison v. Stowe*, 57 Mo. 95; *Leahy v. Railroad*, 97 Mo. 168; *Entwhistle v. Feighner*, 60 Mo. 215; *State v. Martin*, 124 Mo. 524; *State v. Lockett*, 168 Mo. 485. (4) The court did not err in admitting the testimony of Freeman Bailey as to the switch and as to the contrivance mentioned in the specifications of negligence set out in the petition. He was highly qualified to testify as an expert. (5) There was abundant evidence to warrant the submission of the question to the jury as to whether or not Leonard Jewell came to his death from burns caused by a spark from the electric switch in the motor house. *Jewell v. Powder Co.*, 143 Mo. App. 200; *Dumphy v. Stock Yards Co.*, 118 Mo. App. 512; *Ray v. Poplar Bluff*, 70 Mo. App. 252; *Trigg v. Lumber Co.*, 187 Mo. 234.

JOHNSON, J.—This is a suit by the widow of Lindsay Jewell to recover damages for the death of her husband which she alleges was caused by negligence of defendant, his employer. At the first trial the jury in obedience to a peremptory instruction returned a verdict for defendant. Subsequently the court sustained a motion for a new trial on the ground that the evidence aided by admissions in the answer of defendant made a case to go to the jury. Defendant appealed but we affirmed the judgment granting a new trial. [143 Mo. App. 200.]

After our mandate was issued defendant filed an amended answer in the circuit court which, in addition to a general denial, interposed pleas of contributory negligence and assumed risk but omitted the admissions we held aided plaintiff on the issue of the proximate cause of the injury. A second trial of the case resulted in a verdict and judgment for plaintiff in the sum of thirty-five hundred dollars and after unsuccessfully moving for a new trial and in arrest of judgment defendant again appealed. A statement of the facts considered on the former appeal appears in the official report of the case and we will not repeat those facts but will content ourselves with stating the additional facts we find are material to an understanding of the questions of law now before us for determination.

There are six specifications of negligence in the petition, but two of them were withdrawn from the jury and may be dismissed from our consideration. The remaining four relate to the maintenance by defendant of an open knife-blade switch in the motor house adjacent to the corning mill. Plaintiff charges that defendant was negligent; first, in not having an oil switch instead of a knife-blade switch; second, in not providing an automatic current breaker operated by a push button at a safe distance from the switch; third, in not having a long-handled instead of a short-handled switch, and, fourth, in not having the switch enclosed in a dust proof cabinet. It is the contention of plaintiff that while Jewell, in the performance of the duties of his employment, was operating the switch either to turn on or shut off the current, an arc was created and a spark emitted from the switch that fell on his powder begrimed clothing or person and set him afire.

Defendant admits the cause of the injury was the ignition of Jewell's clothing while he was operating the switch and in the original answer defendant al-

leged that the fire came either from a spark from the switch or from a match carelessly lighted by Jewell. Counsel for defendant argued on the former appeal as they do now, that inasmuch as the evidence of plaintiff showed that the injurious spark could have been thrown out from the fuse or motor as well as from the switch, plaintiff had failed to show a sufficient causal connection between the injury and the negligence averred. We rejected the argument on the ground that since there was no evidence to support the theory that a match had caused the injury, the answer must be considered as an admission that the fire came from the switch and that such admission relieved plaintiff of the burden of proving the fact covered by the admission. The amended answer in omitting this admission threw back on plaintiff the burden of proving not only the negligence of defendant in maintaining a defective switch for the use of its servant, but also that such negligence was the proximate cause of the injury. In other words plaintiff, to recover, must prove that a spark from the switch was the cause of the injury. Given the fact that the spark could have emanated from the switch, fuse, or motor, mere proof that the fire originated in the motor house would leave the causal relation of the injury to one or more of the pleaded acts of negligence in the domain of conjecture and speculation and would not satisfy the burden plaintiff must discharge in order to recover.

The evidence bearing on the issue of proximate cause adduced by plaintiff thus may be stated: A witness introduced by plaintiff who was defendant's chief engineer at the times of the construction of the plant and of the injury, testified that he urged defendant's president and superintendent to put in an oil switch on the ground that an open switch would be unsafe, but his suggestion was overruled. After its installation the switch in being opened or closed sometimes produced an arc and emitted sparks and there is

testimony to the effect that Jewell had complained to the superintendent of the tendency of the switch to throw sparks and that the superintendent told him to "Go ahead, some day we will have an oil switch." Immediately after being set ablaze, Jewell ran out of the motor house which was about six feet southwest of the corning mill and, intending to go to a hydrant near the northeast corner of the mill, ran east along the south end of the mill and turned north along the east side. He passed by open doors and fire from his person exploded the powder dust in the mill. Fire from the explosion enveloped him and burned off all his clothing leaving him naked. His skin was burned and charred from head to foot. He fell down but arose and proceeded towards the "wash house" six hundred feet or more away. Two workmen who saw and heard the explosion and heard his cries ran to him and assisted him to the wash house. To them he exclaimed, "I am done for now." Another workman attracted by the explosion and outcries joined him on his way to the wash house and immediately asked him how the accident happened. He replied that he "got fire from the switch and in getting around to the water he tumbled and fell down and he thought if he had not tumbled and fell down he would have made it and got the fire out." He remained at the wash house until the physician arrived when he was removed to a bed in the office. There he remained until he died. Defendant strenuously objected to the admission of testimony relating to the statements made by Jewell on his way to the wash house. At first the court sustained the objection but later decided to admit the evidence. The importance of this ruling, the correctness of which is challenged by defendant, is so great that we shall turn at once to the consideration of its propriety. Though it is clear that Jewell realized his death was certain and imminent, his ante mortem statements relating to the cause of his injury were not admissible as dying

declarations since the rule is well settled that such declarations cannot be regarded as evidence in civil actions.

“Modern decisions,” says Judge Wagner in *Brownell v. Railroad*, 47 Mo. l. c. 244, “clearly establish the doctrine that the rule permitting dying declarations to be given in evidence applies exclusively to criminal prosecutions for felonious homicides and has no reference to civil cases.” The important question for solution is whether the declaration should be regarded as a verbal act of the dying man which formed a part of the whole *res gestae* or as a mere narrative of the past event.

As is said in *Wigmore on Evidence* (Vol. III, section 1745) “there are few problems in the law of evidence more unsolved than what things are to be embraced in those occurrences that are designated in the law as the *res gestae*.” The confusion is not due to any lack of soundness or clearness in the rules themselves but in the variant and antagonistic applications of them to be found in the reported cases. From the time the courts broke away from the illogical and often unjust doctrine that declarations of an injured person relating to the cause of his injury could not be treated as verbal acts, as a part of the *res gestae* where they were not contemporaneous with the main event, and substituted the more enlightened and sensible rules enlarging the scope of the *res gestae*, the decisions of the courts have been marked by a uniform acknowledgment of the soundness of the new rules but by variations in their applications ranging from the low tide of the old doctrine to the high tide of the extreme limit of the new.

In the opinion of the writer the clearest and most concise enunciation of the modern doctrine to be found in the decisions of the courts of this state is in the following excerpt from the opinion in *Leahey*

v. Railway, 97 Mo. l. c. 172: "Care must be taken not to make the field of *res gestae* too large or too contracted. The better reasoning is, that the declaration, to be a part of the *res gestae*, need not be coincident, in point of time with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous exclamation of the real cause. The declaration is then a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration is admissible. Much, therefore, depends upon the nature and character of the transaction in question; for it may be, and often is, of a continuing character. It cannot be said that a mere subsequent declaration will of itself furnish a sufficient connecting circumstance."

It will be observed that Judge Black divides into two classes the instances where declarations uttered after the occurrence of the main event should be considered as verbal acts and not as narratives of past events, viz: *First*, where the declaration is made at a time and under circumstances which indisputably proclaim its spontaneity, i. e., its complete subservience to the influence of the main event, and, *second*, where though subsequent to the main event, it clearly was a part of the single transaction of which that event was a part. In other words, if the declaration be made before the close of the natural and inevitable action of the injury, it should be regarded as a part of the *res gestae*,—of the whole transaction—though the main event has passed into the secondary and consequential stage of its action. Applying these rules Judge BLACK held that the declarations of the injured boy, made when first he was picked up and was surrounded by persons who witnessed the calamity, were admissible as verbal acts; but that declarations

made by him after he had been removed from the scene of the injury to a neighboring house were inadmissible because they could not be said to have been spontaneous nor were they connected with the main fact in any way to make them a part of a single transaction to which that fact belonged. We regard this case as authoritative both in the enunciation of the true doctrine and in the application of its controlling rules. We made a similar application of these rules in the recent cases of *Dunlap v. Railroad*, 145 Mo. App. 1. c. 221 and in *Hooper v. Insurance Company*, decided at this term. In each of these cases we expressed the opinion that there was such a break in the chain of events immediately relating to the injury, and such an opportunity for the intervention of other influences over the minds of the injured persons than that of the main event, that the declarations could not be considered either as wholly spontaneous or as a part of the injurious transaction.

But there are essential and vital differences between the facts of the present case and those to which we have just referred. Here the declaration was made under circumstances which preclude the idea of any lack of spontaneity or of the intervention of any other influence than that of the injury and further the necessary resultant action of the calamity was in progress and it cannot be said that the transaction, as a whole, had passed into history. Jewell was fleeing from the scene of his deathstroke to a place of refuge. In awful agony and in the consciousness of impending death he declared the cause of his injury in the presence of witnesses who had heard and seen the explosion and had heard his spontaneous outcries. These facts in their legal significance closely resemble those considered by the Supreme Court in *State v. Martin*, 124 Mo. 514, and we say, as did Judge GANTT in that case that "no sensible man would reject such evidence in his own affairs," and add that no rule of evidence

compels us to reject as hearsay, evidence which every sensible man would accept in his own affairs. We conclude that the learned trial judge did not err in admitting the evidence and further we think this evidence, considered in connection with the other facts and circumstances of the injury we have mentioned in this and our former opinion, will support a reasonable inference that the injury was caused by a spark emitted from the switch. The facts that Jewell was operating the switch, that it was not provided with any appliance for preventing the throwing out of sparks and that owing to the shortness of the handle Jewell's hand and person were brought within the possible range of such sparks, give strong support to his declaration that his injury was caused by a spark from the switch and remove the issue of the causal relation of the alleged acts of negligence to the injury from the field of conjecture.

Counsel for defendant argue with much earnestness that the evidence of plaintiff fails to sustain the accusation of negligence in providing an unguarded switch. We have little to add to what we said on this subject in our former opinion. In the performance of the duty it owed its servant to exercise reasonable care to provide him a reasonably safe place in which to work and reasonably safe tools with which to work, the law required defendant to take into consideration the natural necessities and dangers of the service and to make a reasonable endeavor to install and maintain a switch that would be reasonably safe under the conditions that defendant knew or should have known would obtain in its operation. What would be reasonable care in one situation would be gross negligence in another. Had the switch been installed in the corn-mill where, at times, the air was filled with powder dust, no one would have the hardihood to contend that to leave it unprotected by any spark quenching or arresting appliance would not have been the grossest

negligence. Obviously defendant built a separate motor house for the purpose of preventing fire or sparks thrown out by electric arcs from coming in contact with powder dust but made no provision for preventing contacts between such fire and sparks and the powder begrimed person of the operator whose duty required him to come into close proximity with the switch.

The evidence presents the issue of defendant's negligence as one of fact for the jury to determine.

Passing to the issue of contributory negligence we are satisfied with the treatment we gave this subject in our former opinion. Defendant contends that the evidence shows that the arc which produced the spark was caused by Jewell's negligent disobedience of orders respecting the use of the rheostat, but we find room in the evidence for a reasonable inference that the condition that appliance was found in after the explosion which wrecked the motor house could have been caused by the explosion and we would not be justified in holding as a matter of law that it was caused by Jewell's negligence. The issue of contributory negligence was properly sent to the jury. We approve the action of the learned trial judge in refusing to direct a verdict for defendant.

Complaint is made of the ruling of the court in allowing Freeman Bailey to give expert testimony relating to electrical switches and their installation in places where high explosives are kept. "An expert is defined to be one who is skilled in any particular act, trade or profession, being possessed of peculiar knowledge concerning the same. Strictly speaking an 'expert' in any science, art or trade is one who by practice or observation has become experienced therein." [Turner v. Haar, 114 Mo. 335.]

The witness was the chief engineer of defendant when the plant was constructed and thereafter until after the injury in question and, as such, was in prac-

tical charge of the electrical machinery and appliances. He had had eight years practical experience as an electrical engineer and had taken a course of study in that science. The fact that he had worked in no other powdermill did not disqualify him as an expert in the subject of the proper construction of electrical switches in places surrounded by high explosives. He qualified as an expert and the weight to be given his opinion was an issue for the jury to determine.

Further defendant complains of the refusal of the court to give the following instruction: "The court instructs the jury that if they believe from the evidence that when defendant constructed its powder plant it made a contract with a reputable corporation of good standing engaged in the business of furnishing and installing electrical appliances in plants operated by electric power and that said contract required that the said appliances should be first class and suitable for the purposes for which they were furnished and that the switch in the motor house of defendant's corning mill was furnished and installed by such contractor under said contract and that defendant's officers in charge of said plant had no knowledge that said switch was not reasonably safe for the purpose for which it was furnished, then the defendant exercised ordinary care to provide a reasonably safe switch in said motor house and your verdict must be in favor of the defendant."

This instruction is based on evidence introduced by defendant to the effect that the electrical machinery and appliances at the plant were installed by a reputable manufacturer to whom defendant gave *carte blanche* to put in the most suitable appliances.

The rule is that where an appliance furnished by the master is not complicated or dangerous and is purchased from a reputable and standard maker, the master is not required to make a minute inspection

of it. But if the appliance, though simple, is put to a hazardous use, the master owes his servant the duty of exercising reasonable care by the inspection of the appliance to ascertain if it is in a reasonably safe condition for the purposes of its intended use. [Tallman v. Nelson, 141 Mo. App. 478.] Defendant could not be held negligent for following expert advice about matters of expert knowledge but any reasonably careful person in its situation would have observed the practical results of the operation of the machinery and appliances installed by the manufacturer and on ascertaining that any of them was doing its work in an unsafe and dangerous manner would have taken proper steps to rectify the defect. The instruction under consideration wholly ignored this duty and was properly refused.

We have examined other points urged for a reversal of the judgment and find they are not well taken. The cause was fairly tried, the judgment is not excessive and accordingly it is affirmed. All concur.

**THE SCARRITT ESTATE COMPANY, Respondent,
v. CASUALTY COMPANY OF AMERICA, Ap-
pellant.**

Kansas City Court of Appeals, June 17, 1912.

ACCIDENT INSURANCE: Indemnity for Accidents: Waiver.

Where the insurer or its agent who takes the insurance knows of the existence of a ground of forfeiture provided in the policy and with such knowledge delivers the policy and collects the premium, the ground of forfeiture is waived.

Appeal from Jackson Circuit Court.—*Hon. Joseph A. Guthrie, Judge.*

AFFIRMED.

Boyle & Howell and J. S. Brooks for appellant.

(1) Appellant's instruction in the nature of a demurrer to the evidence should have been sustained. The policy did not cover loss from liability for injuries suffered by any person before the premises or elevator plant were completed ready for occupancy. The elevator plant was not completed ready for occupancy at the time of the injury. *Donnell Mfg. Co. v. Hart*, 40 Mo. App. 512; *Bestor v. Roberts*, 58 Ala. 331; *Rogers v. Kimball*, 121 Cal. 247; *Winton v. Meeker*, 25 Conn. 456; *Conn v. Jones*, 99 Ga. 608; *Israel v. Reynolds*, 11 Ill. 218; *Pioneer Co. v. Freeburg*, 59 Minn. 230; *Chase v. Hinman*, 8 Wend. 452. (2) A recovery cannot be had on an indemnity bond, by an indemnitee who has not performed a covenant which by the terms of the contract is a condition precedent to any liability on the part of the indemnitor, and it is a good defense that plaintiff has not complied with essential conditions of the bond of indemnity. 22 Cyc., pp. 93 and 102.

Scarritt, Scarritt, Jones & Miller for respondent.

JOHNSON, J.—This is an action on a policy of insurance issued by defendant to plaintiff on June 1, 1907, by the terms of which defendant in consideration of a premium of \$70 agreed to indemnify plaintiff "against loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries . . . suffered through an accident occurring during the term of this insurance policy, by . . . any person . . . not employed by the assured while in the car of any elevator mentioned in the schedule herein or while entering upon or alighting from such car or in the elevator well or hoisting of any elevator." Two elevators one a freight and the other a passenger were specified in the schedule annexed to

the policy which stated that both elevators were "to be used for passenger purposes."

These elevators were in a new office building owned by plaintiff in Kansas City. The policy was signed by defendant's president and secretary, was "countersigned at Kansas City" by Hunter, Ridge & Bryant as the "duly authorized agents" of defendant at Kansas City and was delivered to plaintiff in that city. On July 6, 1907, Paul F. Shortridge, a boy eleven years old, accompanied his mother to the building on a business call she made on a lawyer who had offices in that building. While his mother was engaged in conversation the boy went to the end of the hall to the door of the freight elevator and, prompted by curiosity, put his head into the elevator well through an open panel in the door, and was struck on the head by the elevator car and injured. He brought suit against defendant to recover damages for his injuries on the ground that they were caused by negligence of plaintiff and recovered a judgment in the circuit court for four thousand dollars which, on appeal to this court, was affirmed. [See *Shortridge v. Scarritt Estate Co.*, 145 Mo. App. 295.] His father and mother also sued plaintiff for their damages and recovered judgment for five hundred dollars.

Both of these judgments, together with costs and attorneys' fees, were paid by plaintiff and the purpose of the present suit is to recover of defendant the amount of the loss thus incurred on the ground that it falls within the protection of the policy to which we have referred. At all times since the accident defendant has denied liability, refused to defend the Shortridge suits and in its answer interposed defenses, the principal one of which is that the policy by its terms provided that defendant should not be liable for "injuries suffered by any person before the premises or elevator plant are ready for occupancy" and that neither the office building nor the elevator in ques-

tion were ready for occupancy at the time of the injury.

A jury was waived and after hearing the evidence the court rendered judgment for plaintiff in accordance with the prayer of the petition and after unsuccessfully moving for a new trial and in arrest of judgment, defendant brought the case here by appeal. At the close of plaintiff's evidence defendant asked and the court refused a peremptory instruction. Defendant then introduced evidence and the cause was submitted by the parties to the court without a request from either party for findings of fact or declarations of law. We, therefore, are not advised by the record whether the court, which performed the double function of judge and jury in a law case found for plaintiff on the law or facts. Defendant does not claim that error was committed in the rulings on evidence and with the case in this posture it is our duty to sustain the judgment unless we should find it wholly unsupported by any reasonable theory of the case presented by the pleadings and evidence. [Rice v. McClure, 74 Mo. App. 383; Garrison v. Lyle, 38 Mo. App. 558; Rausch v. Michel, 192 Mo. 293.]

Taking up the point that the loss of plaintiff was not covered by the policy because of the stipulation that defendant should not be liable if the building and elevator were not completed ready for occupancy, we concede the parties who made the contract, lawfully could include an agreement of that character in their contract and that if defendant did not waive the ground of forfeiture thus provided we must give full force to the stipulation. [Hackett v. Phila. Underwriters, 79 Mo. App. 16; Rogers v. Insurance Co., 155 Mo. App. 276; Pelkington v. Ins. Co., 55 Mo. 177; Polk v. Insurance Co., 114 Mo. App. 514.]

But the rule is well settled that if the insurer or its agent who takes the insurance knows of the existence of a ground of forfeiture provided in the policy

and with such knowledge delivers the policy and collects the premium, the ground of forfeiture is deemed waived. The opposite rule would enable an insurance company to play fast and loose with its patrons, to lull them into a feeling of false security by pretending that the insurance was valid and when a loss occurred, bringing forth as a defense a ground of forfeiture that existed from the inception of the contract and of which the insurer all along had full knowledge. "If a party by his silence directly leads another to act to his injury, he will not be permitted, after the injury has happened to then allege anything to the contrary, for he who will not speak when he should will not be allowed to speak when he would." [Riley v. Insurance Co., 117 Mo. App. 229; Hackett v. Underwriters, supra; Cagle v. Ins Co., 78 Mo. App. 431; Polk v. Ins. Co., supra; Shutts v. Ins. Co., 159 Mo. App. 436; Rogers v. Ins. Co., supra.]

The evidence shows that the building was not entirely completed on the dates of the policy and injury; that the construction of the elevator door through which the boy stuck his head was not finished, since it required the insertion of fire glass in the open panels, and that further additions had to be made to the car, but before the policy was issued a number of offices had been completed, tenants had been received and the elevator had been put in commission. The recitations of the written parts of the policy and its annexed schedule as well as other facts and circumstances in evidence demonstrate beyond dispute that defendant's "duly authorized agents" who transacted the business with plaintiff knew the exact condition of the building and its elevators and accepted the elevators covered by the policy as "completed ready for occupancy." With such knowledge they delivered the policy and collected the premium. Defendant retained the premium and at no time before the loss offered to return it and cancel the policy. Under the rule we

have stated defendant is estopped from denying liability on the ground under discussion. There is no merit in the point urged in the reply brief that the loss was not within the purview of the policy because the boy was not injured while in the elevator or in the shaft. He inserted his head into the shaft far enough to have it struck by the car and was in the shaft within the meaning of the policy.

The judgment is affirmed.

All concur.

JACKSON A. LONG et al., Appellants, v. FANNIE
H. RUCKER et al., Respondents.

Kansas City Court of Appeals, June 27, 1912.

1. **SLANDER OF TITLE: Damages.** Any person, who possesses an estate or interest in land, may maintain an action against any one who falsely and maliciously denies or defames his title, and thereby inflicts pecuniary damages upon him.
2. ———: **Landlord and Tenant.** A tenant may maintain an action against his landlord for a false and malicious publication of a slander against the tenancy, if damage has resulted from the slander.
3. ———: **Pleading and Proof.** In actions for slander of title it devolves upon the plaintiff to plead and prove that the words were false, maliciously uttered and resulted in pecuniary loss.
4. ———: **Malicious Intent: Evidence.** The action cannot exist without a malicious intent and to infer the existence of malice the evidence must support a reasonable inference that the representation was not only without legal justification, but was not innocently or ignorantly made.
5. ———: **Landlord and Tenant: Forfeiture of Lease.** A landlord has no right to forfeit a lease and relet the premises because the tenant *contemplates* a transfer of possession to the purchaser of his business.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris,*
Judge.

REVERSED AND REMANDED.

Harris & Finley and *Chas. J. Walker* for appellants.

All authorities agree that in order to entitle the plaintiff to recover in an action for slander of title he must show, first, the publication of slanderous statements by defendant, second, title in plaintiff and consequently that the statements were false, third, that the statements were uttered maliciously, and fourth, that special damage resulted to plaintiff. *Linville v. Rhoades*, 73 Mo. App. 217; *Butts v. Long*, 94 Mo. App. 691; *Butts v. Long*, 106 Mo. App. 313. The statements of defendant, W. H. Rucker, were slanderous and respondents are jointly liable therefor. *Linville v. Rhoades*, 73 Mo. App. 220; *Butts v. Long*, 94 Mo. App. 690; *Kendall v. Stone*, 2 Sanford (N. Y.), 269; *Paull v. Halferty*, 63 Pa. St. 46, 3 Am. Rep. 518. Under the statute it is held that a lease for one year with a privilege of renewal from year to year is a lease for more than two years. *Jones v. Trust Co.*, 99 Mo. App. 433. The lease being assignable, the option to purchase is also assignable. Thus it is held that the option to renew and option to purchase are not merely personal covenant but rights which are assignable to the vendee of the lease. *Napier v. Darlington*, 70 Penn. 64; *Blount v. Connolly*, 110 Mo. App. 603. There were in fact written assignments or transfers of the lease to plaintiffs, but oral assignments would have been good under the facts in this case. The fact that any assignment was not in writing, or was by an insufficient writing, could not in any event be taken advantage of by the lessors, the defendants, who were not parties to the assignments. *Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530; *St. L. & Ry. Co. v. Clark*, 121 Mo. 169; *Geer v. Zinc Co.*, 126 Mo. App. 178.

C. D. Corum, E. W. Hinton and W. M. Williams for respondents.

Plaintiffs had no lease that could be assigned or transferred to creditors, purchasers or third persons. (a) They entered into a new contract with Fannie H. Rucker, after the 30th of March, 1909, for a term not exceeding two years. R. S. 1909, sec. 7880; *Morse v. Roberts*, 2 Cal. 515. (b) The rent was due and unpaid at the time the words for which the suit was brought were spoken by Rucker, and, thereafter, the premises were voluntarily surrendered and the rent never offered or tendered. R. S. 1909, sec. 7903. If, however, defendant was mistaken in his statements about the lease, there is no evidence of malice. It is not actionable for a person to assert his own rights at any time, and it is not sufficient for plaintiff, in such an action, to prove absence of right in the defendant. He must establish express malice. *Butts v. Long*, 106 Mo. App. 313; *Linville v. Rhoades*, 73 Mo. App. 223; *Mayrose v. Adams*, 12 Mo. App. 334; *Harrison v. Howe*, 67 N. W. (Mich.) 528; *Cardon v. McConnell*, 27 S. E. (N. C.) 109; *Lovell Co. v. Houghton*, 6 L. R. A. 363; *Newell on Defamation*, page 206, par. 5. Plaintiff wholly failed to show any pecuniary loss "as the direct and natural result of the publication of the words." 25 Cyc. 561; *Burkett v. Griffith*, 27 Pac. 527; *Newell on Defamation*, page 205, par. 3.

JOHNSON, J.—This is an action for slander of title to real estate. At the close of plaintiff's evidence the court gave a peremptory instruction to the jury to return a verdict for defendants, whereupon plaintiff took an involuntary nonsuit with leave and in due course of procedure brought the case here by appeal.

The evidence of plaintiff discloses the following state of facts: The defendants W. H. Rucker and Fannie H. Rucker are husband and wife. Mrs. Rucker is the owner of a business house in Columbia and her

husband was her agent in the transaction of business relating to the property. In April, 1906, Mrs. Rucker entered into a written contract of lease with Naysmith & Heiberger by the terms of which she leased the property to them for a term of five years from April 1, 1906, at a monthly rental of \$65 payable in advance. The lease contained no provision relating to subletting or to its assignment by the lessees, but did provide that "in case said Rucker (lessor) shall desire to sell the property the second party (lessees) shall have the option to buy at the sale price or to surrender possession after thirty days' written notice to vacate premises." The lessees went into possession of the house under this lease and conducted a bakery and confectionery therein until July 5, 1907, when Naysmith sold his interest in the business and in the lease to plaintiff, J. A. Long and thereafter the business was continued by Long & Heiberger until March 30, 1909, when Heiberger sold his interest to plaintiff, Clarence A. P. Long, the son of J. A. Long. Thereafter the business was conducted by plaintiffs under the firm name of Long & Son. The firm of Long & Heiberger occupied the building as the tenants of Mrs. Rucker under the terms of the lease. Shortly after Clarence Long bought the interest of Heiberger, Mrs. Rucker called on plaintiffs and requested them to sign a written acceptance of the lease. Plaintiffs consented and signed the following agreement written on the lease:

"We the undersigned agree to the above contract and will be responsible for a continuance of the same until it expires, April 1, 1911."

The date of this endorsement is not shown but the parties concede it was within two years preceding April 1, 1911, the date of the expiration of the lease. Plaintiffs continued in the possession of the building until March 10, 1910, and paid the rent to the first of that month. Neither they nor their predecessors paid the rent promptly but defendant made no complaint

and accepted the delayed payments as a sufficient performance of the contract.

Plaintiffs became embarrassed in their pecuniary affairs. They owed a number of debts, including one of \$1500, to Mr. Price, a banker, but their assets exceeded their liabilities. They endeavored to sell the business and eventually found a purchaser with whom on March 19, 1910, they entered into an agreement to sell their stock and the unexpired leasehold for \$4200. The purchaser found it necessary to borrow part of the funds required to pay the purchase price and Mr. Price agreed to lend him the sum he needed. Defendants heard of the proposed sale and finding a tenant who was willing to rent the building at one hundred dollars per month, Mrs. Rucker entered into a contract of lease with him. Before this was done, defendant W. H. Rucker who, as stated, was the agent of his wife, had a conversation with one of plaintiffs in which he said, "You tell Kistler (the purchaser of the stock) he had better see us before he buys that stuff" and in reply to plaintiffs' answer that they had a lease on the building that did not expire for a year, replied, "You tell him he had better see us."

After defendants leased the building to another tenant, W. H. Rucker called at the bank and had a conversation with Mr. Price. We quote the following from Price's testimony:

" I telephoned Mr. Rucker that evening and told him that the creditors felt it to their interest to get someone to purchase those assets in a similar line of business and that I wanted to ask him not to do anything detrimental to the interests of the creditors and . . . he said he would come into the bank to see me Monday and he said he would do nothing until he did come in and see me. That was over the telephone. I next saw him on Tuesday. He came into the bank. On Tuesday I told Mr. Rucker that I was very much sur-

prised to hear that he had leased the building to other parties, in fact, I had a good deal of doubt—I had heard it but had a good deal of doubt that he had leased it, but he told me he had leased it to other parties and I told him that the creditors of Long & Son would insist upon the continuance of the lease and he said they had no lease whatever and we talked about the matter, I think, for probably thirty minutes and as our interests clashed a little bit he said— I told him we were going to hold the building and he said: ‘Anybody that went in there would have a fight’ and then I remember he said ‘Damn ’em—he would show ’em.’—That was the last when I told him we would insist upon the lease. I think that was the last talk I had with Mr. Rucker about it. That was in the bank on Tuesday afternoon. I don’t know whether I told him about the proposed sale to Kistler or not. I told him we were expecting to continue the unexpired lease and I don’t know whether I told him about Kistler or not, but possibly I did. When he said ‘they have no lease whatever’ he was talking about the present tenants of the building, Long & Son. We didn’t conclude this deal with Kistler because we would not furnish the money to Kistler to go there on a proposition where he was to be fought on the lease.”

Mr. Kistler, the purchaser, testified in part: “Well, I think along about—on Saturday, I think, about the 19th of March, R. B. Price negotiated a sale with me on the entire fixtures and stock, baker’s outfit and, I believe, a term of lease on the building, I was to pay \$4200 for it. I was in a position and ready and willing to pay that price at that time. Q. Why did the deal fall through, Mr. Kistler? A. Well, I don’t know. I understood it was on account of not being able to furnish me the building and turn the goods over to me in the building. In my purchase I was to get the building—the lease.”

The evidence shows very clearly that the sale to Kistler was not consummated for the reason that the assault made by Rucker on the leasehold title of plaintiffs in his conversation with Price convinced both Price and Kistler that plaintiffs would be unable to give the latter peaceable possession of the building.

The blocking of the sale put plaintiffs at the end of their resources. They were compelled to turn the stock and keys over to Price for the benefit of their creditors and subsequently the stock was sold at auction under a chattel mortgage given by them to Price. It realized about twelve hundred dollars. Price turned over the keys to defendants who put their new tenant in possession. Defendants made no demand of plaintiffs for the payment of the rent for March, 1910. The petition alleges "that the defendants became aware of the negotiations of the plaintiffs for the sale of their said business, stock of goods, fixtures and rights in said premises and knew that plaintiffs were about to consummate the sale to said J. W. Kistler through the said R. B. Price, Jr., cashier as aforesaid; that said defendants, knowing the facts aforesaid, and unlawfully and wrongfully contriving to get possession of said premises, with a reckless disregard for the injurious consequences that might result from such wrongful actions to the said property and interest of these plaintiffs in said premises, did maliciously and without any probable cause seek to prevent the sale aforesaid, and to that end the said W. H. Rucker, while acting in behalf of himself and his said wife with reference to the possession of said premises, did in said city of Columbia, on or about the 29th day of March, 1910, and before the consummation of said sale to said Kistler, wrongfully, maliciously, falsely and without any probable cause, represent and state in the presence and hearing of said R. B. Price, Jr., that 'they (meaning the plaintiffs) have no lease whatever,' that 'anybody that goes in there (meaning into said premi-

ses) will have a fight,' and, upon being told that these plaintiffs expected to hold said premises under said lease, he also stated to said R. B. Price, Jr., 'Damn 'em (meaning plaintiffs), I will show them.' "

The plaintiffs further state that the said W. H. Rucker well knew and intended that the words so spoken to said R. B. Price, Jr., would prevent, or tend to prevent, a sale of plaintiff's said property and lease.

The plaintiffs further state that by reason of the aforesaid wrongful acts and of the false and malicious statements aforesaid, they were prevented from making sale of their said business, stock of goods, fixtures and of their interest in said premises under said lease to the said J. W. Kistler; that the negotiations for the aforesaid sale to said J. W. Kistler were carried on orally and plaintiffs had no written contract therefor with said Kistler; that said Kistler was unable and unwilling to make said sale unless he could borrow the money aforesaid from said R. B. Price, Jr., cashier of said bank as aforesaid; that on account of the aforesaid wrongful, false and malicious statements of the defendant, W. H. Rucker, the said R. B. Price, Jr., as such cashier, refused to make the loan aforesaid to said J. W. Kistler and said Kistler thereupon refused to consummate said sale, on account of such refusal of said Price to furnish said money.

The plaintiffs further state that upon plaintiffs' failure as aforesaid to consummate said sale to said Kistler, plaintiffs' creditors proceeded immediately to collect their claims, and plaintiffs were forced to dispose of their said business, stock of goods and fixtures, and were forced to dispose of the same at a price much less than the amount which said Kistler had agreed to pay therefor, to-wit, at the sum of about \$1200, that but for the aforesaid wrongful, false and malicious acts and statements of the defendants they would have been able to consummate said sale to said Kistler at the price and sum of \$4200, whereas plaintiffs were

able to procure, and did receive and realize, only the sum of \$1200, for their said stock of goods, business and fixtures, and were unable to dispose of their said lease at any price; and that said premises, at the time of the wrongful acts aforesaid, were reasonably worth the sum of \$100 per month, instead of the sum of \$65 per month which plaintiffs had been paying and were to pay under the terms of said lease.

And plaintiffs further state that "by reason of the aforesaid wrongful acts and of the aforesaid false and malicious statements of the defendants, they were forced to abandon their calling and business and have been rendered unable to liquidate their indebtedness and have been publicly exposed to business failure, their reputation for business integrity has been greatly impaired, and they have suffered great humiliation thereby."

The prayer is for five thousand dollars actual and two thousand dollars exemplary damages. The answer is a general denial.

There can be no question of the right of a person who possesses an estate or interest in land to maintain an action against anyone who falsely and maliciously denies or defames his title and thereby inflicts pecuniary damage upon him. [Linville v. Rhoades, 73 Mo. App. 217; Butts v. Long, 94 Mo. App. 687; Butts v. Long, 106 Mo. App. 313.]

It is said in Townshend on Slander and Libel (4 Ed.), section 204: "When the plaintiff possesses an estate or interest in any real or personal property an action lies against anyone who maliciously comes forward and falsely denies or impugns the plaintiff's title thereto, if thereby, damage follows to the plaintiff." And a tenant may maintain an action against his landlord for a false and malicious publication of a slander against the tenancy if damage has resulted to the tenant from the slander. [Harrison v. Howe, 67 N. W.

527; *Smith v. Spooner*, 3 Taun. 246; *Like v. McKinstry*, 41 Barb. 186; *Hopkins v. Drowne*, 41 Atl. 567.]

The law relating to false statements concerning one's title to property belongs properly to the law of deceit rather than to that of defamation. [Odgers on Libel & Slander, section 138; *Hopkins v. Drowne*, supra.] And it devolves on the plaintiff in such cases to plead and prove that the words were false, were maliciously uttered and resulted in pecuniary loss to the plaintiff. [*Butts v. Long*, 94 Mo. App. l. c. 691.] Of course it would not be actionable for anyone, in good faith, to assert his own right to property and to assail the claim of title made by another. As is well said by Judge ELLISON in *Linville v. Rhoades*, supra:

"We are not unmindful that great abuse, as well as great wrongs, might be perpetrated against parties making claims to things in which they have an interest, if they are to be mulct in damages which may flow from such claim. To guard against such injustice it is, as before stated, necessary to show that the party charged acted not merely ignorantly or mistakenly, but maliciously and falsely, without so much as a probable cause, in the light of his surroundings and situation, to believe in the truth of his statement."

It is incumbent on the plaintiffs to show that defendants could not honestly have believed in the representation. The action cannot exist without a malicious intent and to infer the existence of malice, the evidence of plaintiffs must support a reasonable inference that the representation not only was without legal justification or excuse but was not innocently or ignorantly made. [*Harrison v. Howe*, supra.]

But such inference may rest on a foundation of circumstantial evidence and proof of a lack of probable cause would support an inference that the representation was not innocently made out of stupidity or ignorance, but was known to be false. With these rules, in mind, we pass to the questions of whether or not

the evidence tends to show that defendants falsely and maliciously represented that plaintiffs had no lease and thereby seriously damaged them.

The written lease under which plaintiffs held possession of the building had a year to run. The original lessees had transferred their interests in the lease to plaintiffs and defendants had consented to the transfers and had required plaintiffs to sign a written acceptance endorsed on the lease. Plaintiffs, therefore, were the tenants of Mrs. Rucker under the lease and unless plaintiffs had forfeited the right to remain in possession defendants had no semblance of an excuse for leasing the property to another and defaming the plaintiff's right to possession. It appears to be the idea of defendants that plaintiffs had no right to sell and assign the lease to Kistler and, therefore, that plaintiffs' agreement to sell their stock and leasehold *ipso facto* worked a forfeiture of the lease. In support of this view counsel cite us to section 7880, R. S. 1909, which provides that "no tenant for a term not exceeding two years . . . shall assign or transfer his term or interest . . . without the written assent of the landlord" and contend that since the written acceptance of the lease by plaintiffs was made within two years of the expiration of the term, plaintiffs were tenants for a term of less than two years and, therefore, could not assign the lease to Kistler without the written consent of Mrs. Rucker.

The lease was for a term of five years and the written acceptance did not constitute a new letting—a new tenancy—but, as its language plainly shows, was merely a written acknowledgment and confirmation of the assignment of the lease to plaintiffs by the original lessors and of the substitution of plaintiffs as lessees. The statute had no application to this tenancy and since the terms of the lease did not forbid its sale and transfer plaintiffs had as much right to

sell and assign it as they had to sell or assign any other property belonging to them. 1

Moreover had the tenancy in question come within the operation of the statute, the mere agreement of plaintiffs to assign the lease and to surrender the possession of the building to the assignee at some future time, of itself, would not work a forfeiture as long as plaintiffs remained in possession of the property as lessees. Forfeitures are not favored by the law and the right to claim one always must be strictly construed. There was no reasonable basis for the claim that the contemplated transfer of possession to the purchaser of plaintiffs' stock clothed Mrs. Rucker with the right to forfeit the lease and relet the premises.

There is even less merit in the contention that the default of plaintiffs in the payment of the rent for the month of March forfeited the lease. It is held by the Supreme Court that mere nonpayment of rent will not support an action in ejectment. [Tarlotting v. Bokern, 95 Mo. 541.] "In ejectment," says Judge BRACE, "plaintiff cannot recover without showing that at the time his suit was commenced he was entitled to the possession of the premises sued for. The fact that rent is due, has been demanded, and is unpaid, does not extinguish the relation of landlord and tenant, determine the tenant's term, or give the landlord a right of entry; the only right these facts confer upon the landlord is to institute a summary proceeding before a justice of the peace against the tenant, requiring him to show cause why possession of the property should not be restored to the plaintiff. [R. S., secs. 3097, 3098.] If the tenant appears and shows that the rent has been paid, or on the hearing of the cause tenders the amount of the rent due and costs, that ends the proceeding, and the term of the tenant continues. If he does neither, then the justice may render judgment in favor of the landlord for the recovery of the premises, and

that judgment terminates the tenancy. [R. S., secs. 3098, 3100.]”

As stated in the quotation, the statutes (section 7906), expressly gives the tenant the right to continue in possession of the premises by the payment of the rent at any time before the hearing of the cause by the justice. Defendants had not demanded payment of the rent nor brought suit under the statutes for possession. Clearly plaintiffs had not forfeited the lease and we think the evidence is sufficient to carry to the jury the issue of whether or not the representation which had no legal foundation was maliciously made.

Further we find the evidence tends to show that as a direct consequence of the false representation, plaintiffs suffered special damages which, it is said “are the gist of an action for slander of title.” [25 Cyc. 561.]

Should the jury find the representation was malicious, plaintiffs would be entitled to recompense for the actual loss sustained in consequence of the tort and the jury should be authorized to award plaintiffs exemplary damages.

The judgment is reversed and the cause remanded.
All concur.

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1912.

A. J. ESTES et al., Appellants, v. ROBERT R.
RICHARDS et al., Respondents.

Kansas City Court of Appeals, October 7, 1912.

EQUITY: Judgments: Deeds of Trust. Where a judgment debtor suffers a deed of trust, which is a prior lien, to be foreclosed and takes no steps to protect his interest, in the absence of any fraud in the transaction, equity will not afford relief.

Appeal from Boone Circuit Court.—*Hon. N. D. Thurmond*, Judge.

AFFIRMED.

W. M. Williams and Sebastian & Sebastian for appellants.

(1) Plaintiff's judgments constituted a lien upon the land subject to the deed of trust. Defendant Settle, after agreeing to pay the notes and taking the land subject to the lien of these judgments, could not, by his own default in the performance of his contract, procure a foreclosure of the mortgage. This operated as a fraud upon the plaintiffs, and any fraudulent conveyance to the injury of another can be reached and

avoided in equity. Wait on Fraudulent Conveyances, sec. 24; 20 Cyc. 349. (2) Defendant Settle sold the land to Earsom, an innocent purchaser. So that the judgments cannot be enforced against the land. Defendant Settle, however, received, as a part of the proceeds of this transaction, \$800 for the equity of redemption in the land upon which the transcript judgments were liens. Having transferred that property so that it cannot be reached, the defendant Settle must be held to account for the proceeds thereof. Muskegon Valley Furniture Co. v. Phillips, 21 So. (Ala.) 822; Kickbush v. Corwith, 85 N. W. (Wis.) 631; 20 Cyc. 631.

Arthur Bruton for respondent.

The only force and effect of the clause in the deed from Richards to Settle agreeing to pay deed of trust was to create a personal obligation on the part of Settle to pay the notes and deed of trust mentioned without any limitations as to time or manner of payment. Settle was not in default in the payment of these notes or any part of his contract in any respect. He paid the notes and interest in full. He had a right to pay them at such time and in such manner as would best serve his own interests. He merely assumed Richards' personal obligation and stood between Richards and payment. The plaintiffs are not concerned, as a matter of law, with the agreement between Richards and Settle or the time or manner of its performance. *Smith v. Davis*, 90 Mo. App. 533; *MacAdams v. King*, 10 Mo. App. 578; *Palmer v. McKnight*, 31 Ont. 306; 29 Cyc. 1351, note 41; 20 Am. & Eng. Ency. Law, p. 986. Plaintiffs' second proposition is not in this case. Their suit was brought on the theory of a merger of deed of trust with the equity of redemption. They did not seek a personal judgment against Settle for their judgments. The difference between the consideration in the deed of Richards to

Settle and Settle to Earsom (\$800) represents nothing more than a profit realized out of two separate and distinct transactions. There is no merger in this case and no liability on the part of Settle to plaintiffs. *Bassett v. O'Brien*, 149 Mo. 381; *Hardy v. Atkinson*, 136 Mo. App. 600; *Wonderly v. Giessler*, 118 Mo. App. 718; *Hayden v. Lauffenburger*, 157 Mo. 88.

BROADDUS, P. J.—This suit is for the purpose of setting aside a sale made by the trustee in a deed of trust and that a judgment of plaintiffs against the grantor in the deed of trust be made a lien on the land sold and conveyed by said trustee.

The facts are not in dispute. They are substantially as follows: On the first day of March, 1909, the defendant Settle sold to defendant Richards eighty acres of land in Boone county for the sum of forty-eight hundred dollars. Richards gave in part payment for the land his two promissory notes, one for \$2500, due in five years from date, and one for \$1250, due one year after date, both notes bearing seven per cent interest from date, secured by a deed of trust on the land. Afterward on May 3, 1909, the plaintiffs obtained two judgments against defendant Richards before a justice of the peace, one for the sum of \$165.47, the other for \$136.73. A transcript of each was filed in the office of the circuit clerk May 15, 1909.

On the first day of March, 1910, the defendant Richards resold and conveyed the land to defendant Settle and put him in possession, not long after which he was notified by plaintiffs of the judgments aforesaid. The consideration for the resale was that defendant Settle agreed to pay the notes and interest secured by the deed of trust on the land which, at that time, amounted to about \$4000. Previously, however, Settle had sold and transferred the notes to Mrs. Ruth Arnold. About a year after Settle had obtained a reconveyance of the land from Richards to himself

which he failed to place on record, he procured a sale of the land under the deed of trust and became the purchaser for less than the amount of said notes. On the same day he resold the land to defendant Earsom who, it is admitted was an innocent purchaser, for the sum of \$4800. The court dismissed plaintiffs' petition and rendered judgment in favor of defendant for costs. From the judgment plaintiffs appealed.

At the outset we are confronted with a condition that is somewhat novel in that the plaintiffs' suit is for the purpose of setting aside the sale made by the trustee to Settle, one of the consequences of which would be to vitiate the deed Settle made to the defendant Earsom who bought in good faith and is admitted to be an innocent purchaser. The plaintiffs recognize that under this condition no such relief can be afforded, but insist that it is within the power and is the duty of the court to affirm the sale made by the trustee and to compel Settle to account for \$800, the difference between the amount of the two notes secured by the deed of trust on the land and which he had agreed to pay, and the amount he received from Earsome on the sale of the land he made to him. Perhaps if a miscarriage of justice could be averted thereby the strong arm of equity should interfere and disregard the allegations of the petition and the prayer for relief and afford the relief now asked.

It must be conceded that when the defendant Settle took a reconveyance of the title to the land and obligated himself to pay the notes secured by the deed of trust he "slipped into the shoes of the mortgagor as to that debt, became the principal debtor, and the mortgagee was, thereafter bound to recognize him as such," etc. [Smith v. Davis, 90 Mo. App. 533; Pratt v. Conway, 148 Mo. 291.] The judgments of plaintiffs rendered prior to the transaction were a lien on defendant Richards' interest in the land prior to the resale of the land to Settle, such interest being the right

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to redeem the land by payment of the two notes and interest secured by the said deed of trust.

The plaintiffs took no steps, however, to protect their lien and suffered the deed of trust to be foreclosed which in the absence of fraud extinguished the judgment lien on Richards' equity of redemption. But the argument is that the defendant Settle should have paid off the two notes as he had agreed to do, in which event plaintiffs' lien would have been left intact and the notes would have stood cancelled.

But we do not understand that when Settle agreed to pay the two notes that he assumed any obligation whatever to plaintiffs to pay them as his undertaking was with Richards for the benefit of Mrs. Arnold. The plaintiffs had their remedy. They could have had the equity of redemption sold under the judgment and bought in the land, or they could have attended the trustee's sale and protected themselves by bidding on the land or bidding enough to satisfy the judgment. But their conduct in failing to do either indicates that this proceeding is the result of an afterthought. They had the same opportunity to buy in the land as Settle had. He bought in as he had a right to do to protect his title. The plaintiffs had the right to purchase to protect their judgment. It was a fair and open transaction without a taint of fraud. The plaintiffs' plea is a dilatory one and without merit. The judgment is affirmed. All concur.

STATE OF MISSOURI, Respondent, v. GEORGE CAMPBELL, Appellant.

Kansas City Court of Appeals, October 7, 1912.

1. **LOCAL OPTION:** Evidence: Impeaching Witness: Cross-Examination. It is error to refuse to allow a witness to answer questions pertaining to his conviction of criminal offenses.

2. ———: ———: Criminal Offenses: Include Misdemeanors. The term criminal offense, as used in Sec. 6383, R. S. 1909, has been construed to include misdemeanors.
3. JURY: Remarks of Judge. The court has no right to address the jury orally as to their duty. The law contemplates that when the jury have heard the evidence and have been instructed as to the law, they understand the nature of their duty.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris*, Judge.

REVERSED AND REMANDED.

Harris & Finley for appellant.

(1) The court erred in excluding the testimony as to the previous criminal record of the State's witness, Jack Houston. *State v. Blitz*, 171 Mo. 530; *State v. Arnold*, 206 Mo. 597; *State v. Kennedy*, 207 Mo. 528. (2) The court erred in making oral statements to the jury, which statements prejudiced defendant's case in the minds of the jury. *Skinner v. Stifel*, 55 Mo. App. 13; *Parkleton v. Pugsley*, 107 Mo. App. 678; *Clark v. Fairley*, 30 Mo. App. 335.

E. C. Anderson and *W. H. Sapp* for respondent.

We contend that police court convictions for violations of city ordinances are not admissible as evidence to impeach the credibility of a witness. It is not a "criminal offense" to violate a city ordinance. *Mexico v. Harris*, 115 Mo. App. 707; *City of Gallatin v. Tarwater*, 143 Mo. 40; *City of St. Louis v. Weitzel*, 130 Mo. 600. We insist that the mere fact of the instruction or statement to jury being oral is no ground for reversing the case as the statement was made in the presence of counsel for defendant. *Skinner v. Stifel*, 55 Mo. App. 13; *Walsh v. St. Louis Drayage Co.*, 40 Mo. App. 339. We suggest that this court is not authorized to reverse judgments only for prejudicial errors. *Skinner v. Stifel*, 55 Mo. App. 13.

BROADDUS, P. J.—The defendant was tried and convicted on a charge of violating the Local Option Law in force in Boone county. The information contained three counts. The defendant was convicted on the third count. From the judgment of the court defendant appealed.

On the trial the State introduced a negro man named Houston who testified that John Lawson gave him seventy-five cents with which to buy whiskey and that he went to defendant's place of business and bought from him a pint of whiskey for which he paid seventy-five cents. There is some evidence of a circumstantial nature tending to corroborate the evidence of Houston.

On cross-examination Houston was questioned for the purpose of being impeached. He was questioned as follows: "I will ask you if on February 14, 1910, you didn't plead guilty to being drunk in Judge Stockton's justice court?" "On February 28, 1910, didn't you plead guilty before Justice Stockton to passing whiskey into the jail?" "I will ask you if you were not convicted of disturbing the peace of Amanda Campbell the same month?" To each of these questions the State objected as to its competency. The court sustained the objections.

The jury failed to agree on the day the cause was submitted to them and they were permitted, with the consent of parties, to separate until the following day. When the jury were called in the afternoon of Tuesday the judge, before he sent them to the room to consider further the case, addressed them as follows: "Gentlemen of the jury, before sending you to your room at this time to further consider your verdict, I think it would be proper for me to say that it is your duty to deliberate together in a friendly manner and, if it is possible for you to agree upon a verdict without violating your oaths and your consciences, that it is your duty to do so. Our criminal laws are admin-

istered by and through juries and if they do not agree or attempt fairly and honestly to agree then no conclusion can be reached and cases go undetermined and the law is not administered. You will understand, of course, that in these remarks the court is not attempting to coerce you in any way but simply to say that if you can fairly and honestly agree upon a verdict by conferring together in a friendly manner that it is your duty to do so."

The defendant's counsel objected to the foregoing remarks of the court.

The court was in error in refusing to allow the witness Houston to answer the various questions propounded to him. Section 6383, R. S. 1909, provides that "any person who has been convicted of a criminal offense is, notwithstanding, a competent witness; but the conviction may be proved to affect his credibility," etc. This section has been construed and it is held that the term, criminal offense, includes misdemeanors. [State v. Blitz, 171 Mo. 530; State v. Arnold, 206 Mo. 1. c. 597; State v. Kennedy, 207 Mo. 528.] The court was also in error in the remarks the judge made to the jury. There was no necessity for the judge to tell the jury that unless they agreed in such cases the criminal law would not be administered. It is insisted by the counsel for the state that there is nothing in the remarks of the court that the jury did not already know. That is, perhaps, true. If so, what motive could the judge have had in making a useless statement? The jury evidently concluded that the judge would not have used the language in question unless he meant something that was to be read between the lines. We do not wish to be understood as imputing any improper motive to the judge, but the address was unfortunate. The court had no right to address the jury as to their duty in the premises. The jury were to be guided by the written instructions. "To admonish them as to their duty, as was done, invaded

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their province. The law contemplates that when the jury have heard the evidence and have been instructed as to the law, they understand the nature of their duty.

The judgment is reversed and the cause remanded. All concur.

LAWRENCE B. BAILEY, Appellant, v. THE
LIVERPOOL LONDON & GLOBE INSUR-
ANCE COMPANY, Respondent.

Kansas City Court of Appeals, October 7, 1912.

FIRE INSURANCE: Concealment of Facts: Question of Jury.

Plaintiff sued on a policy of fire insurance issued by defendant to cover a dwelling, but the building was used as a candy factory. The defendant's agent inspected the building before the policy was issued. The plaintiff, a non-resident of the state, was unaware that it was used for a candy factory. Defendant did not insure buildings used for factory purposes and charged plaintiff with deceitful concealment of fact to obtain the policy. *Held*, that under the evidence the issue of fraudulent concealment was one for the jury to solve.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

REVERSED AND REMANDED.

Albert I. Beach and *H. H. McCluer* for appellant.

(1) The court erred in giving instruction in the nature of a demurrer to the evidence at the close of all of the evidence, peremptorily requiring the jury to find in favor of the defendant. *Boggs & Leathe v. American Ins. Co.*, 30 Mo. 63; *Ormsby v. Ins. Co.*, 105 Mo. App. 143; *Williams v. Ins. Co.*, 73 Mo. App. 607;

Thomas v. Hartford Fire Ins. Co., 20 Mo. App. 150; Dowling v. Ins. Co., 168 Pa. 234; Busnell v. Ins. Co., 110 Mo. App. 223; Shotliff v. Ins. Co., 100 Mo. App. 138; Rosencram v. Ins. Co., 66 Mo. App. 352; Niagara Fire Ins. Co. v. Johnson, 4 Kan. App. 16.

Boyle & Howell and *J. S. Brooks* for respondent.

(1) A statement on the face of the policy as to the character of the building or the use and occupancy thereof is a warranty, and if not true it will avoid the policy, whether material to the risk or not. *Kenefick-Hammond Co. v. Ins. Co.*, 119 Mo. App. 312; *Baker v. German Fire Ins. Co.*, 124 Ind. 490; *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545; *Stout v. Ins. Co.*, 12 Iowa, 371; *Aiple v. Ins. Co.*, 100 N. W. 8; *Deweese v. Ins. Co.*, 35 N. J. L. 366; *Boyd v. Ins. Co.*, 90 Tenn. 212; *Lochner v. Home Ins. Co.*, 17 Mo. 247. (2) The use of the building here was such as to make the risk more hazardous. By the failure to disclose it, the insurer was induced to issue the policy when if it had known the risk it would have declined it. *Kenefick-Hammond Co. v. Ins. Co.*, 119 Mo. App. 312; *Goddard v. Ins. Co.*, 108 Mass. 56; *Kenefick-Hammond Co. v. Ins. Co.*, 205 Mo. 294; *Cooley's Briefs on Insurance*, p. 1290 (Vol. II); *Lochner v. Ins. Co.*, 17 Mo. 247; *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568; *Ins. Co. v. Barnett*, 73 Mo. 364.

BROADDUS, P. J.—This is a suit on a policy of insurance against fire. The defendant issued a policy insuring plaintiff against loss by fire for a period of five years, from the 9th day of March, 1901, to the amount of \$300, on his house, described as a "one story frame shingle roof dwelling house, etc., situated in rear of No. 1012 Locust street, Kansas City, Missouri." The house was totally destroyed by fire; proof of loss was duly made, and payment of the

amount of insurance demanded and refused by defendant.

The defense to the action is, that the house was insured as a dwelling, whereas, it was used as a place for the manufacture of candy; and that defendant did not insure buildings used for factory purposes.

Defendant alleges in its answer that, had it known or believed that said building was not a dwelling house, or that it was used as a candy factory, the application for insurance would have been rejected, and, if such knowledge had come to defendant at any time before the destruction of the building, the policy would have been cancelled. It is further set up as a defense that plaintiff well knew, at the time application for insurance was made, that the building was used as a candy factory; and that he deceitfully concealed said fact from defendant for the purpose of obtaining the policy and inducing the defendant unwittingly to assume a risk of greater hazard than it would have assumed at any price.

The facts are, that the plaintiff was the owner in fee of the lot on which the house was situated, and that Don T. Edwards was the owner of a lease from him of the lot for ninety-nine years. The contract for the lease provided that Edwards should insure the house for plaintiff's benefit. Edwards and J. G. Brownson, defendant's agent, were friends. Edwards informed Brownson, who was soliciting business for defendant, that he wanted the property insured, and the latter, at the request of the former, went to see the house, but did not enter it and judged from its appearance that it was a dwelling house and issued the policy in controversy. It was also shown that Edwards himself did not know that the house was occupied as a candy factory. He owned other property in the city. He lived in Kansas, over two hundred miles distant, and leased his property through an

agent, and did not know of the use to which the house was put.

After the close of all the testimony, the court, at the instance of defendant, instructed the jury to find for defendant, whereupon plaintiff took a nonsuit with leave to move to set it aside. Plaintiff filed his motion to set aside the nonsuit in due time, which the court overruled and rendered judgment accordingly. Plaintiff appealed.

There is no question of false representations in issue, but the sole question is, did the plaintiff obtain the insurance by knowingly and falsely concealing the fact that the building was not a dwelling house, but a factory building? This was a question of fact, but it seems to have been treated as a question of law by the trial court.

The burden was upon the defendant to prove that the plaintiff or Edwards, who obtained the policy, knew at the time that the same was issued that the house was used as a candy factory. If defendant introduced any such evidence, it was at the most merely inferential. On the other hand, plaintiff's evidence was positive that Edwards did not know that the house was used for a candy factory, and that Brownson, defendant's agent, had the opportunity of informing himself as to that when he went to inspect it. The evidence thus shows, instead of fraudulent concealment upon the part of Edwards as to the character of the house, gross negligence upon the part of defendant's agent, who was deceived as to the truth of the matter by assuming, from appearance, that the house was in fact a dwelling. All the evidence of any probative force goes to show that the plaintiff did not fraudulently conceal the fact that the house was used as a factory, but that the fault as to that matter lays with Brownson, defendant's agent.

The plaintiff was entitled, at least, to have the issue submitted to the jury, as the evidence was over-

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whelmingly in his favor. This was the only issue in the case. The plaintiff asks this court to enter up a judgment in his favor, but, in view of the facts and circumstances in evidence, the credibility of plaintiff's witnesses may be a question for the jury. Reversed and remanded. All concur.

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LOUISA SCHUPP, Respondent, v. WABASH
RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, October 7, 1912.

1. **NEGLIGENCE: Humanitarian Doctrine.** Plaintiff's husband was struck and killed by one of defendant's trains while he was on the track picking up coal. *Held*, that the evidence failed to make out a case under the humanitarian doctrine.
2. ———: ———: **Contributory Negligence.** An engineer seeing a man on the track ahead has the right to assume, until the contrary appears, that the man is observing due care for his own safety and will step out of the way in time.
3. ———: ———: **In Peril.** It is not sufficient, in order to recover under the humanitarian doctrine, to show that the engineer actually saw the deceased in time to have stopped or checked the train, but it must be further shown that the engineer discovered that he was in peril in time to have avoided striking him.

Appeal from Chariton Circuit Court.—*Hon. Fred L.*
Lamb, Judge.

REVERSED AND REMANDED.

J. L. Minnis, J. C. Wallace and Guthrie & Franklin
for appellant.

John D. Taylor, Gilbert Lamb and John T. Barker
for respondent.

BROADDUS, P. J.—The plaintiff is the wife of George Schupp, deceased, who was killed by one of the defendant's trains near Brunswick, Missouri, on the 13th day of December, 1908. She claims that his death was the result of defendant's negligence, for which she claims damages under the statute in the sum of \$10,000. She recovered judgment for \$6000, from which defendant appealed.

There are two tracks at the point where deceased was killed, running parallel, about eight or ten feet apart, and there separating the south line curving westward, and the north line turning to the northwest. The plaintiff claims that her husband was struck while walking on the south track, facing west, meeting the train. On the other hand, defendant claims, that when the train approached from the west deceased was on the north track picking up coal and putting it into a wheelbarrow that was between the tracks; that when the train approached, he saw the train and mistook which track it was on, and immediately stepped to his wheelbarrow, took hold of the wheel end of it and moved it toward the south track, on which the train was coming; and that in so doing he stepped a little too close to the south track and was hit by the pilot of the engine and killed.

The deceased resided in Brunswick, and his son was in the employ of the defendant as a section man. It was shown that the defendant gave its employees permission to gather coal scattered along its tracks. On the morning of the day mentioned, the deceased, at the request of his son, went on the railroad tracks near the western limits of the town for the purpose of picking up coal to be used in his son's house. There was a well-beaten footpath at the point where the deceased was struck, which had been used by the traveling public for many years. The track was level and straight enough for him to have been seen by the engineer for 1000 feet as the train approached.

The only eye witnesses to the occurrence were the engineer and fireman, and a Mr. Shepherd and his wife. It appeared by the evidence that the Shepherds were sitting on the front porch of their residence, fronting south, about three-quarters of a mile away. Their residence is on the side of a hill elevated about 300 feet above the track. At the time a man by the name of Willis was also on the porch. Mr. Shepherd's testimony is, that he saw the approaching train when it was at DeWitt, several miles away, and he also observed at the same time a man walking on the south track who "every once in a while it looked like he would stoop down and pick up something and when the train came across the bridge he was right in the middle of the track, like he was walking down the middle of the track; he never left the track until the train struck him. At the time the train left DeWitt he was bent over—sidelike—he was picking up something—I couldn't say what he was picking up. He was not looking at the train—he was bent over. I could not say how long he was on the track, but he was on it from the time the train left Dewitt until it struck him. He never done anything to indicate that he knew the train was coming. I never seen him make any kind of move like anything bothered him. . . . No signal was given at all, until just about the time the train struck him and then there was two short whistles." Mrs. Shepherd's evidence corroborates that of Mr. Shepherd in all essential particulars.

The evidence of defendant's fireman was to the effect, that he was attending to firing the engine and did not see deceased until the engineer gave a whistle, when he looked up and saw the man with a wheelbarrow between the two tracks, who looked as if he was trying to pull it across; that when the engineer "commenced whistling the man ran around to the other track, then ran back to our track and started to get the wheelbarrow and just as he got to the edge of the

track when the pilot beam struck him." At the time the engineer commenced sounding the whistle the witness stated that they were in about fifty or sixty yards from the man.

The defendant's engineer, who was operating the train in question, testified, that it was running at about the rate of thirty-five miles per hour, and that as the train approached the Grand River bridge and at a distance from it of about 200 yards he gave the usual signal; that in passing through the bridge the track is straight for a short distance, then curves to the right or south; that he noticed, when he got up to the curve, a man ahead; that he did not pay any attention to the man at the time, "for the simple reason, there are men along the track every place, trespassers and trackmen, but getting closer I noticed that this man had a wheelbarrow, and he was at the—when I got close enough to see about where he was, he was on the north or high line track, and I knew, or supposed, almost positive, in the position he was that he knew where he was at, and he was perfectly clear of the track that we were on." He stated that at that time the man was about 100 yards distant; that he saw the man grab the wheelbarrow by the wheel in front and instead of pulling it away to the north he pulled it to the track he was on; that immediately he grabbed the whistle, shoved on the emergency brake and did all he could to stop, as he knew the man would not clear the pilot if he persisted in pulling his wheelbarrow to the south; that when he was struck he could not see him because the boiler obstructed his view.

There was evidence offered by defendant tending to contradict Shepherd and his wife. The train was running on time and deceased lived near the track, and knew that the train was due.

The plaintiff sought to recover on the ground that the engineer of defendant saw or could have seen the deceased in a position of peril on the track in time to

have avoided striking him. The fact is, that the engineer actually saw the deceased at a sufficient distance to have stopped or checked the train before it reached him. But it was necessary to further show that the engineer discovered that he was in peril in time to have avoided striking him.

According to the evidence of Shepherd and wife, deceased was on the track and appeared oblivious to the fact that a train was approaching. But no credit should be given to that part of their evidence. It was impossible, at the distance of three-fourths of a mile away, that they could see that deceased was acting as if he was unconscious of the fact that there was a train coming from the west, facing him; especially when we consider the further statement that they could not tell that he had a wheelbarrow and what he was picking up. It was possible, however, for them, at the vantage of their position of 300 feet elevation above the railroad tracks, to have discovered which of the two tracks the deceased was on at the time. No one, even had he been present, could have told from the manner of deceased, as far as disclosed, whether or not he was unaware of danger. Had he been on the track, of which there is grave doubt, facing the coming train, in plain view, and notwithstanding he was stooping and supposedly picking up coal, he could not have helped seeing or hearing the train, and the only natural inference would be that he would get out of the way. To believe otherwise is impossible, unless the person was both blind and deaf. The engineer had the right to infer that deceased would both see the train and hear its rumbling, and get out of danger. There must have been something in the conduct of the deceased to indicate to a person of ordinary prudence that he was not aware of his peril before the engineer was called upon to slacken the speed of, or stop his train.

It is held that, "an engineer seeing a man on the track ahead of him has the right to assume, until the contrary appears, that the man is observing due care for his own safety and will step out of the way in time." [Veatch v. Railroad, 145 Mo. App. 232; 3 Elliott on Railroads, sec. 1153; Pennell v. Railroad, 153 Mo. App. 566.]

The plaintiff relies on the holding in *Smith v. Railroad*, 129 Mo. App. 413, and like cases to sustain the judgment. In that case, it is true, plaintiff was going on defendant's track facing the coming train, and was struck and injured. But it was shown that the day was cold and a snowstorm was in progress and the plaintiff had his head wrapped up and he was walking in a bent position, all of which the defendant's engineer could have discovered in time to have averted striking him.

In *Murphy v. Railroad*, 228 Mo. 56, the deceased was drunk, sitting on the end of a tie, a short distance from defendant's station in the town of Kirksville, in plain view of the engineer for a long distance, with his body partly bent over one of the rails of the track. The court held that there was sufficient evidence for a case for the jury under the humanitarian rule.

In *Ahnefeld v. Railroad*, 212 Mo. 280, the deceased, an old man, was walking along the track leisurely, the train of defendant following, struck and killed him. The evidence disclosed that no effort was made to warn him of his danger until the engine was in a few feet of him, and the speed of the train was not slackened. The plaintiff was allowed to recover. In all the cases cited there was some fact or circumstance shown to exist that would put a prudent man on guard in time to have avoided the danger.

The plaintiff failed to make out a case under the humanitarian rule and the court erred in refusing to

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sustain defendant's demurrer and instruct the jury accordingly. Reversed. All concur.

On motion for rehearing modified so as to reverse and remand.

NORA F. SNORGRASS, Respondent, v. A. J. THOMAS, Trustee of the Estate of WILLIAM P. SNORGRASS, Deceased, Appellant.

Kansas City Court of Appeals, October 7, 1912.

1. **WILLS: Intent of Testator.** In the construction of wills the cardinal rule is to give effect to the true intent and meaning of the testator.
2. ———: ———. This can be best ascertained by the courts by putting themselves in the place of the testator and reading all his directions therein in the light of his environment at the time the will was made.
3. ———: ———. In order that the court may place itself as near as possible in the place of the testator and read his will from the same standpoint from which it was written, the circumstances surrounding the testator, the subject-matter of the devise, and the persons to be benefited, may be considered in order to determine the objects of his bounty.
4. ———: ———. The words "shall lose her husband" are construed to mean, in this case, a cessation of the marital relation whether that event should be occasioned by the death or divorcement of the husband.
5. **PRACTICE, TRIAL: Defect of Parties: Demurrer.** A defect of parties to an action must be raised by demurrer, or answer, or the point is waived.

Appeal from Moniteau Circuit Court.—*Hon. John M. Williams, Judge.*

AFFIRMED.

W. F. Quigley and Jeffries & Corum for appellant.

(1) By filing suit and procuring a divorce from her husband, plaintiff did not lose her husband within the meaning and intention of her father, as expressed in his will. *Shafer v. Senseman*, 125 Pa. 310; *Bank v. Buhl*, 129 Mich. 193; *Sovern v. Yorn*, 20 Pa. 100; *Thorne v. Marffin*, 100 Pa. 515; *Vorrman v. Jenkins*, 12 Wend. 563. (2) A testator's understanding of the meaning of the words used in his will will be adopted without resorting to lexicographers to determine what the same words mean in the abstract, or to adjudicated cases to discover what they have been decided to mean under different circumstances. *Reinders v. Coppelman*, 94 Mo. 343; *Hall v. Stephens*, 65 Mo. 670; *Douglas v. Livingston*, 15 Mo. 230. (3) In construing a will the intention of the testator, if legal, governs. *Murphy v. Carlin*, 113 Mo. 117; *Redman v. Barger*, 118 Mo. 573; *Watson v. Watson*, 110 Mo. 170; *Long v. Timms*, 107 Mo. 510; *Chew v. Keller*, 100 Mo. 369 and 373.

D. N. Bybee and R. M. Embry for respondent.

(1) The will says "if my said daughter shall lose her husband, J. Denzil Bowles," etc., then, that is, at that time, "said half held by said trustees shall be paid and handed over to my beloved daughter," etc. This clause vested in the daughter the absolute estate when she lost her husband. 28 Am. & Eng. Ency. Law (2 Ed.), p. 128. (2) The next clause in the said seventh division says, "or if my said daughter shall have a child," etc. This evidently refers back to the time she lost her husband, and means if she had a child at that time. It is admitted she did not. The word "then" refers to the losing of her husband, and also requires she have a child at that time to prevent the vesting of the estate in the daugh-

ter. 28 Am. & Eng. Ency. Law (2 Ed.), p. 128. (3) The seventh clause of said will provides that if testator's daughter "lose her husband," etc., then the estate shall vest in her absolutely. If the contingency of "losing her husband happened" the estate vested. If the estate vested under this clause, then such estate cannot be limited or changed by any subsequent clause in the will. *Roth v. Rauschenbusch*, 173 Mo. 582; *Stratton v. McKinnie*, 62 S. W. 636. (4) The law favors the vesting of estates. Therefore if respondent "lost her husband" within the meaning of the will, the estate at that time could only vest in the daughter, respondent herein. Subsequent provisions in the will, will not prevent vesting of estate. *Moor., Admr., v. Sleet*, 68 S. W. 642.

JOHNSON, J.—This is an action in equity instituted in the circuit court of Moniteau county August 1, 1911, against the trustee of an estate created by the last will of William P. Snorgrass who died testate in that county in January, 1908. Plaintiff who was the daughter of Snorgrass and one of the beneficiaries of the trust estate alleges that the purpose of the trust has been accomplished and prays that it be dissolved and the trustee ordered to pay to plaintiff her share of the estate. The principal defense is that the object of the testator, as expressed in the will, has not been satisfied and that the trust must be continued until it is satisfied. The court, after hearing the evidence, adopted plaintiff's view of the issues raised by the pleadings and rendered judgment in accordance with the prayer of the petition. Defendant appealed.

There is no serious controversy over the facts of the case. Shortly after the death of plaintiff's father his will was duly probated, letters testamentary were issued and the estate was administered in accordance with the will. The present action, which was not be-

gun until after the close of the administration, involves the interpretation of the following paragraphs:

(1). "I direct my executors to erect a modest tombstone upon my lot wherein my body shall be buried after my death, at a reasonable cost, and the lot wherein I shall be buried shall be kept in respectable appearance and order for the period of ten years after my death, at a cost of not exceeding five dollars per year."

(5). "It is my express will and I hereby convey, transfer and assign to Jacob Hainen, Jr., and William P. Kuttenkuler all of my personal property, consisting of notes with personal security for money loaned, notes for money loaned and secured by mortgages and deeds of trust, and other securities and investments of which I may be possessed at the time of my death, as well as all cash I may be entitled to at the time of my death, in trust, to hold for the purposes mentioned in this my last will and testament; and for the benefit and use of the legatees of my estate and the same to be cared for, held in trust, protected and loaned upon good first class personal or real estate security and the interest thereon to be collected by said trustees once a year and oftener if found practicable and desirable, and the said trust funds to be paid out as directed in this my last will. Said trustees, for their attention, care and management of the personal property herein conveyed to them in trust, shall be paid at the rate of not exceeding one per cent per annum on the total amount so conveyed to them in trust."

(6). "It is my will that there be paid out of the trust estate so created by the fifth paragraph of this will and hereby placed in the hands and put under the watchful care and management of the said Jacob Hainen, Jr., and Wm. P. Kuttenkuler as trustees, the following sums of money annually to my said wife, Frances P. Snorgrass, four hundred dollars annually, commencing from the date of my death, so long as

my said wife shall live, both of said payments to cease upon the death of my wife; and then the income shall be paid to my beloved daughter, Nora F. Bowles, on one-half of said trust fund during her natural life, less the charge for care, and subject to the other conditions of this my last will."

(7). "It is my will that upon the death of my beloved wife that my estate shall be equally divided between my daughter, Nora F. Bowles, and my wife's sister, Lucy A. Carpenter, they two to share equally, the one-half to be paid over to said Lucy A. Carpenter in such securities as are in possession of my said trustees at the date of my wife's death, the other half and the income therefrom to be continued in the possession of said trustees and except the percentage allowed to such trustees and interest arising therefrom to be paid over to my said daughter, Nora F. Bowles, annually, commencing from the date of the death of my said wife, and it is further my will that if my said daughter shall lose her husband, J. Denzil Bowles, then said half held by said trustees of my said estate shall be paid and handed over to my beloved daughter, Nora F. Bowles, absolutely, to do with as she may desire, or if my said daughter shall have a child of her body, then it is my will that said half of my said estate shall continue to be administered in trust for my daughter during her lifetime and upon her demise the same shall be paid over to said heir of her body, if it shall have reached the legal age of maturity, but such estate shall only be paid over to an heir of her body; and it is further my express will and desire that if neither of the last two conditions occur during the lifetime of my said daughter, Nora F. Bowles, then said one-half interest upon the death of my said daughter shall be paid over to my brothers and sisters, if living, and if not then living, their several shares herein provided for, if living, shall be paid over to the children of their respective bodies and to the heirs

of their bodies under the laws of descent and distribution, and it is further my express will and desire that if my wife shall survive my said beloved daughter, Nora F. Bowles, and if said daughter shall not leave an heir of her body, then upon the death of my beloved wife, said trustees shall pay over to my said brothers and sisters and to their bodily heirs, as hereinbefore set out, the one-half of my estate."

The persons nominated as trustees in the fifth paragraph refused to act and defendant was appointed in their stead. He took possession of the trust estate and has administered it in accordance with the provisions of the trust. At the time of the death of Snorgrass plaintiff was the wife of J. Denzil Bowles. No children were born of the marriage. In 1911, plaintiff brought an action for divorce in the circuit court of Moniteau county and in May of that year was granted a divorce and the restoration of her maiden name. In May, 1910, the executors of the will made their final settlement in the probate court and were discharged. In the same month they delivered the trust estate into the hands of defendant.

Plaintiff bases her alleged right to the immediate possession of one-half of the trust estate on the ground that in obtaining a final decree of divorce from her husband she brought herself within the purview of the seventh paragraph of the will which entitled her to a moiety of the trust estate as her absolute property. The language of the will directly called in question by this contention is "that if my said daughter shall lose her husband, J. Denzil Bowles, then said half held by said trustees of my said estate shall be paid and handed over to my beloved daughter, Nora F. Bowles, absolutely, to do with as she may desire, or if my said daughter shall have a child of her body, then it is my will that said half of my said estate shall continue to be administered in trust for my daughter during her lifetime and upon her demise the same shall

be paid over to said heir of her body, if it shall have reached the legal age of maturity. . . ."

Defendant argues that properly construed the words "shall lose her husband" refer to the possible event of the death of plaintiff's husband prior to her own and do not include the event of a legal separation of husband and wife caused by the voluntary act of the latter.

In the construction of wills the cardinal rule is to give effect to "the true intent and meaning of the testator." [Section 583, Revised Statutes 1909; *Murphy v. Carlin*, 113 Mo. l. c. 117; *Redman v. Barger*, 118 Mo. l. c. 573.] And as is well said in *Murphy v. Carlin*, supra, "The true intent and meaning of the testator can be best ascertained by the courts and those concerned in the execution of wills by putting themselves, so far as may be, in the place of the testator and reading all his directions therein contained in the light of his environment at the time it was made. When that intent and meaning can be thus clearly ascertained, then all technical rules and adjudicated cases in other jurisdictions that would stand in the way of its execution must be disregarded."

The will must be read as a whole in the light of the circumstances surrounding the testator and where the lexicographic definition of words used in the instrument would be out of harmony with the true intent of the testator as expressed and explained in the context the intent, if legal, must govern and technical definitions must give way. "The testator's understanding of the meaning of the words used in his will, will be adopted 'without resorting to lexicographers to determine what the words may mean in the abstract, or to adjudicated cases to discover what they have been decided to mean under different circumstances' (*Dugans v. Livingston*, 15 Mo. 230); and in order that the court may place itself as near as may

be in the place of the testator and read his will from the same standpoint from which it was written, the circumstances surrounding the testator, the subject-matter of the devise, and the persons to be benefited may be considered in order to determine the objects of his bounty." [Reinders v. Koppelman, 94 Mo. l. c. 343.]

With these rules before us we revert to the will and to the circumstances of its execution to ascertain the true intent of the testator respecting the bequest made for the benefit of plaintiff, his daughter. As the death of the testator's wife preceded his own death the only bequest that fell under the operation of the trust created in the fifth paragraph of the will was that intended for the benefit of plaintiff and the obvious purpose of the testator, clearly expressed in the seventh paragraph 'was to continue that trust during the existence of the marital relations of plaintiff and her husband, J. Denzil Bowles, and if a child should be born of that union to continue the trust until such child should become of legal age, notwithstanding the end of said marital relation or the death of plaintiff might precede that event. That the testator intended only to make provision for a child born of the existing marriage and not for the issue of any possible subsequent marriage of his daughter is evidenced by the provision terminating the trust in the event of her losing her husband while still childless. No child having been born of the marriage it is conceded that had plaintiff lost her husband by his death that event, *ipso facto*, would have ended the trust and entitled her to receive the bequest as her absolute property. What meaning did the testator intend should be given the expression "shall lose her husband, J. Denzil Bowles?" As applied to property the word "lose" ordinarily refers to an involuntary, not a voluntary, deprivation. No man may be said to have lost that which on his motion he abandons or

resigns. [See cases cited in 5 Words and Phrases, 4237, *et seq.*] And in common speech the expression "has lost his wife" or "has lost her husband" generally is understood to refer to a loss by death and not to the voluntary divorcement of the spouse. But in the light of all of the expressed purposes of the will, we think the testator intended the term should be given a broader meaning. Manifestly a lack of confidence in plaintiff's husband inspired him to create a trust of the bequest made for her benefit that effectually would protect the estate against the possible inroads of the husband. Doubtless he felt that so long as the marital relation continued it would not be safe to allow his daughter the full possession of her inheritance lest she be deprived of it in some way by her husband. With the end of the childless marriage would come the end of the power of the husband feared by the testator. The very fact that an expression susceptible of a more comprehensive meaning than that referring only to the possible death of the husband was used by the testator, taken in connection with the purpose to be served by the trust, convinces us that the testator intended the trust should cease with the cessation of the marital relation whether that event should be occasioned by the death or divorcement of the husband.

But it is argued by defendant that such interpretation would render the will void on the ground that the testator in holding out an inducement to plaintiff to procure a divorce violated a well known rule which forbids outside interference with the marital relation. A contract designed to promote or facilitate divorce, being opposed to the policy of the law, is void. [Blank v. Nohl, 112 Mo. l. c. 169.]

The law zealously guards the marriage relation and if we thought the will in hand was designed to hold an inducement to plaintiff to obtain a divorce from her husband we would condemn the provision

creating the trust as *contra bonos mores*. But we find no evidence in the will of such intention. Certainly a father acts within the scope of his parental right in protecting a devise, or bequest, to his child against the possible depredations of her husband and in providing for the vesting of the absolute estate in the child on the cessation of the cause of the protective measures, that is to say, on the termination of the marriage relation, the father should be deemed to have been actuated by the praiseworthy motive of making suitable provision for possible future contingencies rather than by the reprehensible motive of attempting to impair the domestic happiness of his child by inciting her to a separation from her husband.

Point is made by defendant of a defect of proper parties because of the failure of plaintiff to join the remaindermen as defendants. The point was not raised by demurrer or answer and, therefore, was waived. [Section 1804, Revised Statutes 1909.]

The contention of defendant that the first paragraph of the will required the continuance of the administration of the estate of the decedent during a period of ten years, if well founded, is immaterial to the issues of the present action. Defendant received and holds the trust estate as trustee of an express trust. In the absence of a contrary showing we must presume that adequate provision was made by the executors for the performance of the duty imposed by the first paragraph before the distribution of the estate and that the bequest received by defendant was not burdened with that duty.

We conclude that the learned trial judge properly decided the case and, accordingly, the judgment is affirmed.

All concur.

SANTA FE CAR ICING CO., Appellant, v. T. J. KEMPER, JESSE WILLIAMS, M. L. MILLER, FRED R. EWING, ROBERT ROBERTSON, HARRY H. ALLEN, J. S. LYONS, W. H. HULL, THOMAS L. CONNELLY, WEBB CARLTON, B. M. CLINE, E. E. SCHULTZ and HARRY CZARLINSKY, Respondents.

Kansas City Court of Appeals, October 7, 1912.

1. **JUDGMENTS: Default: Motion to Set Aside.** A motion to set aside a final judgment must be considered a petition for review falling within the operation of Sec. 2104, R. S. 1909.
2. ———: ———: ———. The statute allows a motion to set aside a default before final judgment, but not after.
3. ———: ———: ———. A party in default may obtain relief against a judgment even after it is final if he has good grounds and adopts the proper procedure; namely that prescribed by Sec. 2104, R. S. 1909.
4. ———: ———: ———. Where the petition for review is not verified and fails to show a meritorious defense to the action or the exercise of due diligence to prevent a default, it should be denied.

Appeal from Jackson Circuit Court.—*Hon. Kimbrough Stone*, Special Judge.

REVERSED AND REMANDED (*with directions*).

Lathrop, Morrow, Fox & Moore for appellant.

(1) An appeal lies from the order setting aside the judgment. *Miller v. Crawford*, 140 Mo. App. 711; *Harkness v. Jarvis*, 182 Mo. 231. (2) A motion to set aside judgment by default must state facts which show a meritorious defense and be supported by an affidavit showing due diligence. R. S. 1909, sec. 2104; *Cowan, Trustee v. Bircher*, 5 Mo. App. 577; *Campbell v. Garton*, 29 Mo. 343; *Castilio v. Bishop*, 51 Mo. 162; *Palmer v. Russell*, 34 Mo. 476; *Biebinger v. Taylor*, 64 Mo. 63. (3) Due diligence and a meritorious de-

fense must be shown. R. S. 1909, sec. 2104; *Billingham v. Miller Co.*, 115 Mo. App. 154; *Hoffman v. Loudon*, 96 Mo. App. 184; *Lecompte v. Wash*, 4 Mo. 557; *Weimer v. Morris*, 7 Mo. 6; *Field v. Matson*, 8 Mo. 686; *Kerby v. Chadwell*, 10 Mo. 392; *Austin v. Nelson*, 11 Mo. 193.

Charles L. Shannon for respondents.

JOHNSON, J.—This is an action on a bond commenced in the circuit court of Jackson county, October 31, 1910. The defendants are the principals and two of the three sureties who executed the bond. The principals were partners engaged in the business of selling ice under the firm name of The Ice Wagon Drivers Union and the bond was executed and delivered to plaintiff, a manufacturer of ice, to secure the payment of ice to be purchased by the partnership. The petition alleges that after the execution of the bond, plaintiff, at divers times, sold and delivered ice to defendants of the value of \$519.75, for which defendants failed to pay and prays judgment on the bond for that sum, with interest and costs. An answer in the nature of a general denial was filed January 12, 1911, by all of the defendants. W. F. Lyons signed this answer as the attorney of the defendants but made no further appearance in the case and was superseded by Charles Shannon, another member of the Jackson county bar.

The case was set for trial on March 25, 1911, but was not tried on that date for the reason that Mr. Shannon had gone abroad. It was reset for trial on June 14 of the same year but again was continued for the same reason. On or about November 29, 1911, the assignment judge set the case for trial on December 6, 1911. Mr. Shannon had returned from his foreign trip but had gone to Chicago on professional business before the assignment of the case for trial and did not

return until after the day of trial. He had no knowledge of the setting of the case but did know that court was in session and that the case was subject to assignment. He left no instructions at his office about the case and the person left in charge of his office could find no memorandum of it on the office docket. Learning of Mr Shannon's absence the attorney of plaintiff who was anxious to try the case had Mr. Shannon's office informed of the approaching trial, and on the morning of the trial day, conferred with Mr. Lowe who had been a law partner of Mr. Shannon and was thought by plaintiff's attorney and the court officers still to be his partner. At the end of the conference Mr. Lowe told plaintiff's attorney to "go ahead and take judgment. We are not interested in it." When the case was called plaintiff answered ready and no one appearing for defendants a default was entered and the court proceeded to hear evidence offered by plaintiff. The evidence was to the effect that plaintiff had sold and delivered eight cars of ice to defendants of the total value of \$519.75; that at different times defendants had given plaintiff two checks of \$119.70 each on account of the purchases; that these checks had been dishonored and that no part of the account had been paid. The court then rendered the following judgment:

"Twentieth Day November Term, 1911. Wednesday, Dec. 6th, 1911.

"Now on this day this cause coming on regularly for trial, comes the plaintiff by its attorneys and defendants come not at this time, but make default, and now plaintiff waives a jury in the trial of this cause, and defendants are deemed to waive a jury and this cause is submitted to the court upon the pleadings and the court having heard the evidence and being fully advised in the premises finds for the plaintiff in the sum of five hundred and fifty-two dollars and fifty cents (\$552.50).

"Wherefore it is ordered and adjudged by the court that the plaintiff have and recover of and from defendants the sum of one thousand dollars (\$1000) the amount of bond sued on herein to be satisfied by the payment of said sum of five hundred and fifty-two dollars and fifty cents (\$552.50) with interest thereon from this date at the rate of six per cent per annum together with the costs of this cause, for which last mentioned sum, interest and costs let execution issue."

Ten days later, Mr. Shannon filed on behalf of defendants a "motion to set aside default judgment" as follows: "Now come defendants and move the court to set aside the judgment rendered by default in the above entitled cause on the 6th day of December, 1911. Defendants state that they have a good and sufficient defense to plaintiff's claim as set out in plaintiff's petition; that this cause was set for trial and judgment rendered while the attorney for defendants, Charles L. Shannon, was out of the city and out of the state; that neither of the defendants nor their attorney had knowledge of the setting of the case for trial nor of the plaintiff's taking judgment by default until several days after said judgment by default was rendered.

"Wherefore defendants ask that the said judgment by default so rendered be set aside and the case again set for trial."

This motion, which was not verified by affidavit, was heard and sustained December 23, 1911, and plaintiff appealed from the order setting aside the judgment and granting defendants a new trial. At the hearing of the motion Mr. Shannon testified: "Several days prior to the time that this case was called and set for trial, I did not know when it was set, I was called to Chicago to take depositions and I went to Chicago and took the depositions and I knew nothing about the case being set, and I expected to be away over the term, and went to Chicago and took the depo-

sitions and on my return, I was told that judgment had been rendered by default; I was informed that Mr. O'Flaherty and Mr. Reynolds did everything that they could to get me, but I was out of the city after the case was assigned to this division, and Mr. Lowe had not anything to do with me, he is not my partner any longer, he is by himself and I am by myself; he knew nothing about the case; I was not employed while I was with him in the case, and the officer tried to find Mr. Lyon, who was formerly the attorney in this case, before I was employed; I cannot see where I have been to blame, I did not know anything about it. If I had known it I would have been here."

No attempt was made to show a meritorious defense to the cause of action pleaded in the petition and the only reference to the defense appears in the following colloquy:

By the Court: "I think there seems to be some misunderstanding about the case, if there is a substantial defense."

Counsel for plaintiff: "There is absolutely no showing of any defense." Mr. Shannon: "I do not have to, all I have to do is a general denial."

By the Court: "Is there any?"

Mr. Shannon: "Yes, sir, absolutely. I am perfectly willing to go to trial and not delay it a minute, and the very first case that is set for trial I will try it; I will make arrangement to have it set for trial the very first case."

The motion to set aside the judgment was filed at the term at which the judgment was rendered and though not filed within four days after the rendition of the judgment, was filed in time to invoke the control a circuit court is given by law over default judgments. The motion is not to be treated as a motion for a new trial (*Harkness v. Jarvis*, 182 Mo. 231) nor as a motion under section 2094, Revised Statutes 1909 to set aside an interlocutory judgment by default. The judgment at-

tacked was a final, not an interlocutory judgment by default (*Miller v. Crawford*, 140 Mo. App. 711) and the motion must be considered as a petition for review falling within the operation of section 2104, Rev. Stat. 1909. As is well said by Goode, J., in *Billingham v. Commission Co.*, 115 Mo. App. 154: "The statute allows a motion to set aside a default before final judgment, but not after. [Rev. Stat., section 770; *Matthews v. Cook*, 35 Mo. 286; *Burns v. Burns*, 61 Mo. App. 612.] A party in default may obtain relief against a judgment even after it is final if he has good grounds and adopts the proper procedure; namely that prescribed by section 780 (2104, Rev. Stat. 1909) of the Revised Statutes."

The petition in hand fails to conform to the requirements of section 2104 in every vital particular. It was not verified by affidavit and it fails to show that defendants exercised due diligence to prevent a default or that they have a meritorious defense to the action. The mere fact that defendant's attorney "was out of the city and out of the state" when the case was set for trial and had no knowledge of the setting of the case until after final judgment had been rendered is no excuse for the default, no plea of due diligence. Six days intervened between the setting of the case and the trial day and had the attorney left proper instructions with those in charge of his business during his absence he could and, doubtless, would have been informed of the setting of the case in ample time to have prevented the judgment by default being taken against his clients. His own testimony but emphasizes the weakness and insufficiency of his allegation of diligence.

The averment in the petition that defendants "have a good and sufficient defense to plaintiff's claim" is not a compliance with the statute which requires that such defense be set forth in the petition. The facts constituting the defense must be stated in

Bassett v. Railroad.

order that the court may determine whether or not they constitute a good defense. [Pry v. Railroad, 73 Mo. 123.] The bare assertion of the attorney in his petition and testimony that a good defense existed conveys no information to the court concerning the nature of the defense and offers no foundation for the operation of a sound judicial discretion. In setting aside the judgment the learned trial judge exceeded the bounds of a sound discretion and accordingly the judgment is reversed and the cause remanded with directions to enter judgment for plaintiff in accordance with the views expressed. It is so ordered. All concur.

WILL O. BASSETT, Respondent, v. WABASH
RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals. October 7, 1912.

NEGLIGENCE: Master and Servant: Defective Brake. Plaintiff, a brakeman, while standing beside a car giving signals for switching to the engineer, was struck in the face by a fragment from a brake shoe which had fallen down to the track and broke. The car did not belong to defendant, but was a foreign car. The key which held the brake shoe to the brakehead was missing from its proper place, and the brake shoe fell in consequence thereof while the car was in motion. *Held*, that under the evidence the jury were entitled to believe that reasonably careful visual inspection would have disclosed the instability of the key and the likelihood of its loss, and that a brake so worn and defective that its key would not remain in place during the transportation of the car, was not a reasonably safe appliance.

Appeal from Randolph Circuit Court.—*Hon. A. H. Waller*, Judge.

AFFIRMED.

J. L. Minnis and Robertson & Robertson for appellant.

M. J. Lilly and Hunter & Chamier for respondent.

JOHNSON, J.—Plaintiff sustained personal injuries while in the service of defendant as a brakeman and alleges in his petition that his injuries were caused by negligence of defendant. The answer is a general denial and pleas of assumed risk and contributory negligence. Verdict and judgment were for plaintiff in the sum of three thousand dollars and the cause is here on the appeal of defendant.

The injury occurred in defendant's yards at Mexico while the crew of a local freight train of which plaintiff was head brakeman was switching a car of lumber to the team track for unloading. The train had left Moberly that morning and was bound for Montgomery City. On arriving at Mexico its crew followed their usual custom of doing the switching necessary to be done in the yards at that point and were so engaged when the injury occurred. The car of lumber in question had come from St. Louis the day before and was being switched to the team track when one of its brake shoes fell to the track and broke. A fragment from the broken shoe struck plaintiff in the face and injured him. The car was owned by another railroad company and was received by defendant at St. Louis for transportation to Mexico, its destination. The brake and brake shoe were of standard make and may thus be described. The brake shoe was cast iron about fourteen inches long, four or five inches wide and two inches thick; weighed twenty or twenty-five pounds and was curved to fit the rim of the car wheel against which it would be pressed to retard the motion of the wheel. The convex side of the brake shoe was attached to the concave side of the brake head which,

in turn, was attached to the brake beam. The adjoining sides of the brake shoe and brake head were provided at the ends and in the middle with interlocking perforated lugs. When in position the holes in the lugs met in a way to form a continuous vertical opening for the reception of a key that locked the brake shoe to the brake head. The key was of iron or steel, was about fourteen inches long and an inch wide, was curved to conform to the curvature of the line of contact between the brake shoe and break head and was inserted into the channel through the lugs from the top. A head at the top of the key kept it from working down. The arrangement of the lugs and the curvature of their plane of attachment were designed to hold the key firmly in position and to give proper rigidity to the device. Plaintiff was standing near the track giving signals to the engineer when the brake shoe became detached from the brake head and fell. It is his contention that the mishap was caused by the loss of the brake key occasioned by the worn and defective condition of the brake shoe and the interlocking lugs which had so impaired the device that the key was not held in position by the lugs but had become loose and had worked upward by the jolting of the wheels while the car was running until it had fallen out.

The petition alleges that plaintiff "was struck by said brake shoe and by a piece or pieces thereof by and in direct and immediate consequence of the negligent failure and omission of defendant to repair and keep in repair said brake shoe, and by the negligent failure and omission of defendant to replace said dangerous, defective and unsafe brake shoe with one that was safe and thus furnish and provide him, the said plaintiff, with reasonably safe and sufficient machinery and appliances for the equipment, movement and operation of said train and of the cars thereof and of said other cars in said railroad yards, and of the negligent failure and omission of defendant to prop-

erly inspect said train and cars when defendant knew, or by such inspection might have known of the defective condition of said brake shoe and by reason of the negligent failure and omission of defendant to warn plaintiff of the dangerous and defective condition of said brake shoe."

The evidence of plaintiff tends to show that the brake shoe was old and so worn that its attachment to the brake head had become defective and insecure and that the key was not held in position by the lugs which also had become worn but was so loose that it easily could have been worked out of its position by the jarring of the wheels in running over rough places in the track. The brake shoe was broken in two pieces and plaintiff who examined the pieces two days after the injury testified they disclosed the existence of an old crack at the place of the break. One of plaintiff's witnesses contradicted him on this point, testifying that the broken ends showed no indication of an old crack or flaw. The brake key could not be found and, doubtless, had been lost during the transportation of the car from St. Louis. There is evidence to the effect that the brake shoe might have continued in its position for a time after the loss of the key. Further it appears from some of the evidence that such brake keys are not always held tightly in place but may be removed with little difficulty and sometimes are removed by trespassers or even by trainmen who use them as chisels to open car doors and sometimes forget to replace them. The evidence of defendant tends to show that the car in question which, as stated, was a foreign car, was inspected by defendant at its yards in St. Louis and Moberly and that its brakes were found to be in good condition and so reported by the inspectors. As to the inspection of brake shoes the inspector at St. Louis testified on cross-examination:

"Q. In case you find a defect in the brake shoe do you specify what the defect is? A. I certainly do.

"Q. If you find a brake shoe where it is worn thin do you make a record? A. No, sir.

"Q. How nearly worn out does it have to be before you would? A. I never have rejected any of them yet. . . .

"Q. Do you look at each brake shoe individually? A. Look at all of them.

"Q. What would have to be discovered before you would consider it a defect, mark it a defect? A. Broken or gone.

"Q. The brake shoe would have to be broken or gone altogether? A. Yes, sir.

"Q. Before it would be marked defective? A. Yes, sir."

The evidence of another inspector who inspected the car in substance was the same. Defendant introduced in evidence the following rule of the company: "Trainmen must know that the cars in their trains are in good order before starting, and inspect them whenever they have an opportunity to do so, particularly when entering or leaving sidings or waiting for other trains. All cars taken in their trains at intermediate stations must be examined with extra care." The principal contention of counsel for defendant is that the court erred in refusing their request for an instruction in the nature of a demurrer to the evidence of plaintiff. It is argued that the evidence fails to show that negligence of defendant was the proximate cause of the injury but does show that plaintiff's own negligent breach of the rule of the company just quoted directly contributed to his injury. We shall discuss these propositions in the order of their statement.

It is conceded the injury was caused by the falling and breaking of the brake shoe while the car was in motion and that the brake shoe fell in consequence of the loss of the key from its proper place, while the evidence of defendant discloses that the key could

have been abstracted by a trespasser or trainman, the inference that such was the fact rests more on conjecture and speculation than on an evidentiary foundation. It is manifest from all the evidence that owing to the worn and defective condition of the brake, the key was loose in its socket and the inference is reasonable that its displacement was caused by the jolting of the wheels in running. Such inference is not speculative but rests on a substantial evidentiary basis.

The duty of defendant towards plaintiff, its servant, called for the exercise of reasonable care to keep the instrumentalities with which and about which plaintiff was required to work in reasonable repair. The jury were entitled to conclude that a brake so worn and defective that its key would not remain in place during the transportation of the car was not a reasonably safe appliance. But it is argued that defendant was not an insurer of the safety of the brake and that its whole duty towards its servant was performed when it inspected the car at St. Louis and its inspectors found the brake in good order and so reported it.

The failure of a railroad company to provide for the inspection of cars at reasonable intervals would constitute a breach of its duty towards its servants to exercise reasonable care for their safety and the negligent failure of its inspectors to do their work properly would be negligence for which the company should be held liable. The evidence does not show any negligence of defendant except in the manner of the performance of the work of inspection at St. Louis. The brake was in plain view and its worn condition was apparent. The jury were entitled to believe that a reasonably careful visual inspection would have disclosed the instability of the key and the likelihood of its loss on the trip of the car to Mexico and that in reporting the brake in good order the inspectors neg-

ligently failed to perform the duty the master intrusted to them.

We conclude this branch of the case with the observation that the evidence of plaintiff tends to show that his injury was the direct result of negligence of defendant in failing to exercise reasonable care to provide its servant with a reasonably safe place in which to work. We do not think plaintiff should be held guilty of negligence in law because of his failure to inspect the brake before the car was shunted to the unloading track. The evidence fails to disclose that he had a reasonable opportunity to make such inspection and the rule of defendant in evidence certainly cannot be interpreted as requiring a brakeman on his own initiative and regardless of the instructions of the conductor to delay switching operations by inspecting every car moved from one track to another. That would be an unreasonable construction to place on the rule. The demurrer to the evidence was properly overruled. We find no prejudicial error in the record and the judgment is affirmed. All concur.

**CAROLINE DAVISON, ROSALYN LOEWNER,
EMIL DAVISON, HELEN BROWNING, HAR-
RY C. DAVISON and DANIEL DANCIGER,
Respondents, v. BANKER'S LIFE ASSOCIA-
TION, Defendant, TILLIE DAVISON, Inter-
pleader, Appellant.**

Kansas City Court of Appeals. October 7, 1912.

- 1. LIFE INSURANCE, MUTUAL: Divorce: Beneficiary: Idem Sonans.** Two certificates of membership in a Mutual Life Insurance Association named the wife of the insured, Tillie Davison, as the beneficiary. Upon the death of the member, his former wife, Caroline Davison, from whom he had obtained a divorce, sought to recover the proceeds of the certificates upon

166 Mo. App. 40.

the ground that the divorce was illegal, because in the publication of service her name was spelled "Davidson" instead of "Davison," and that therefore she was the wife of the insured at the time of his death. *Held*, that "Davidson" and "Davison" are *idem sonans*, the judgment for divorce valid, and the widow, Tillie Davison, entitled to the proceeds of the certificate.

2. **IDEM SONANS: Identical Sound:** Where the name as spelled, though incorrect, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the correct name, as commonly pronounced, the name thus given is a sufficient designation.
3. ———: ———. It matters not how two names are spelled, what their orthography is; they are *idem sonans* within the meaning of the books if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long continued usage has by corruption or abbreviation made them identical in pronunciation.
4. **DIVORCE: Service by Publication.** In an action for divorce, where service is obtained by publication, the judgment for divorce is not invalid because in the publication the name of the defendant was spelled "Davidson" instead of "Davison."

Appeal from Jackson Circuit Court.—*Hon. Thomas H. Seehorn*, Judge.

REVERSED AND REMANDED (*with directions*).

P. M. Kistler for appellant.

H. S. Julian for respondents.

JOHNSON, J.—This action was instituted against the Bankers' Life Association, a corporation doing a mutual life insurance business under the laws of Iowa, to recover the proceeds of two certificates of membership issued to Samuel Davison in October, 1893. The plaintiffs are Caroline Davison, who claims to be the widow of Samuel Davison, and their children. Davison procured a decree of divorce from his wife, Caroline, in 1889 in the Circuit Court of Livingston county and was married in 1895 to his second wife, Tillie, who also claims the proceeds of the policies as his

widow and beneficiary. He lived with his second wife until his death which occurred September 4, 1909. The Bankers' Life Association answered admitting its liability and praying that as Tillie was a rival claimant she be made a party defendant and that the association be allowed to pay the proceeds of the policies into court for the benefit of the successful claimant. Afterward Tillie was made a party defendant. She appeared and filed an answer and cross-petition in the nature of an interplea in which she alleged that she was the lawful widow of the deceased member, was the beneficiary named in the policies and prayed judgment for the proceeds of the policies. An answer was filed by plaintiffs to this cross-petition and a reply to the new matter alleged in the answer was filed by defendant Tillie. These pleadings sufficiently raised the issues we shall discuss in the course of the opinion.

A jury was waived by the parties and the court, after hearing the evidence, rendered judgment for plaintiffs. Defendant Tillie appealed. A motion to dismiss the appeal was filed in this court by plaintiffs but in the last brief of their counsel the motion was withdrawn and as we find no vital defect in the proceedings relating to the prosecution of the appeal we shall consider the case on its merits. Sometime before the trial in the circuit court the defendant association paid the proceeds of the policies into court and thereafter the only contest in the case was between the two rival claimants of the fund and the primary issue was whether Caroline or Tillie was the lawful wife of Samuel Davison at the time of his death. It is not disputed that Tillie was married to Samuel in 1895 and that thereafter they lived together as husband and wife until his death in 1909, but it is contended by plaintiffs that this marriage was void for the reason that Samuel was not legally divorced from his first wife, Caroline. When the certificates were issued the beneficiary named in them was the estate of

Davison. After his marriage to Tillie, Davison (with the consent of the association) changed the beneficiary and the certificates were made payable "to my wife Tillie Davison and my children, viz., Louis Davison, Rosalyn Davison, Helen Davison, Emil Davison, Harry Davison, in equal shares . . . the above six beneficiaries are bearing to me the relation of wife and children." Still later Davison changed his beneficiaries with the consent of the association and made his wife Tillie the sole beneficiary. It is conceded these changes were valid if Tillie was the lawful wife of Davison and the issue of whether or not she was lawfully married depends entirely on the solution of the question of the validity of the divorce granted Davison from his first wife. The proceedings in the divorce suit were attacked by plaintiffs at the trial on a number of grounds but all of these grounds are abandoned in the latest brief of counsel for plaintiffs except those we shall discuss. It appears from findings of fact and conclusions of law made and filed by the court that all of the points urged by plaintiffs against the validity of the divorce proceedings were ruled against them except one which the court held was well taken and was fatal to the decree. That point thus may be stated:

When the divorce suit was instituted, the defendant Caroline Davison had absconded, could not be served personally with summons and consequently service was made by publication. In the order of publication, subsequent proceedings and judgment, the name "Davison" was incorrectly spelled "Davidson." The circuit court held that the names "Davison" and "Davidson" are not *idem sonans*, and, consequently, that there was no legal service by publication. The court deemed this defect so vital that it infected the whole proceeding, made nugatory the decree of divorce and that Caroline remained the lawful wife of Samuel to the day of his death.

We shall concede for argument that plaintiffs, after the lapse of over twenty years from the decree of divorce and after their father had lived with defendant in supposedly lawful wedlock for more than fifteen years, may attack the validity of the decree in a collateral proceeding and still we find ourselves unable to agree with the view of the learned trial judge that the divorce should be held for naught on the ground of a vital mistake in the order of publication with respect to the spelling of the family name.

"The rule of *idem sonans* is that absolute accuracy in spelling names is not required in a legal document or proceedings either civil or criminal; that if the name, as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the correct name as commonly pronounced, the name thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error." [4 Words & Phrases, 3380.] This rule has received repeated recognition in this State. [Robson v. Thomas, 55 Mo. 581; State v. Havely, 21 Mo. 498; Whelen v. Weaver, 13 Mo. 92; Maier v. Brock, 222 Mo. 74; Graton v. Holliday, 189 Mo. 322; State v. Griffie, 118 Mo. 188.]

In Robson v. Thomas, *supra*, the Supreme Court say: "It matters not how two names are spelled, what their orthography is; they are *idem sonans* within the meaning of the books if the attentive ear finds difficulty in distinguishing them when pronounced or common and long continued usage has by corruption or abbreviation made them identical in pronunciation."

The following names have been pronounced *idem sonans*: Elberson-Elbertson, Johnson-Johnston, Wilkerson-Wilkinson, Hutson-Hudson, Robinson-Robertson, Bolen-Bolden. The second "d" in Davidson re-

quires an effort in pronunciation that the average tongue seeks to avoid by omitting to sound the letter. The general pronunciation of both names is Davison and under the rules stated they are *idem sonans*. We are not bound by the finding of the trial court to the contrary. Though the action was begun as one at law on a policy of insurance, it was converted by the pleadings into a proceeding in equity. The issues relating to the fund paid into court which were raised by the pleadings of the rival claimants are of equitable cognizance and the facts as well as the law pertaining to those issues are before us for review. This, without more, sufficiently answers the contention of plaintiffs that the question of whether the two names are *idem sonans* is a question of fact, in a law case. Counsel for plaintiffs contend the decree of divorce was void and is open to collateral attack at this late day because there was no legal foundation for the order of publication, or, to be more specific, the fact that Caroline had absconded and could not be served with process in this state was not made to appear in the manner prescribed in the statutes.

Section 1770, Revised Statutes 1909, provides that "if the plaintiff or other person for him . . . shall file an affidavit stating that part or all of the defendants . . . have absconded or absented themselves from their usual place of abode in this state," the court, or in vacation the clerk thereof, shall make an order for service by publication. In attempted compliance with this provision an affidavit was made by S. J. Jones to the effect that Caroline Davison had absconded or absented herself from her usual place of abode in this state and that process could not be served upon her. This affidavit was filed in the cause and was the basis of the order of publication issued therein. The point against the affidavit is that it omitted to state the affiant was the agent of the plaintiff. If, in fact, Jones did make the affidavit as the agent of the

plaintiff the omission from the affidavit of a recital of that fact at most was but an irregularity that could have been cured either by an amendment of the affidavit or by proof of the fact *aliunde*. [Bank v. Spangler, 69 Mo. App. 172; Gilkeson v. Knight, 71 Mo. 403; Burnett v. McCluey, 92 Mo. 230.]

A mere irregularity of this character cannot serve as the foundation of a collateral attack on a judgment otherwise regular. We must presume, in the absence of proof to the contrary, that Jones made the affidavit as the agent of Davison and that the court in issuing the order did not act until proof of that fact had been adduced.

There is no merit in the further point advanced by plaintiffs that notwithstanding the affidavit in question was sufficient the order could not be issued without compliance with the provisions of section 1772, Revised Statutes 1909. That section provides that a *non est* return on a summons may serve as a ground for issuing an order of publication but it does not relate to cases where an affidavit of non-residence is made pursuant to section 1770. In the latter cases the issuance and return of summons is not made a prerequisite for an order of publication.

We find the judgment for divorce is valid and that the defendant Tillie, as the lawful widow of Samuel Davison and the beneficiary named in the certificates is entitled to the proceeds of the certificates. The judgment is reversed and the cause remanded with directions to enter judgment in accordance with the views expressed. All concur.

SANDY P. HUFF, Respondent, v. MISSOURI
PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals. October 7, 1912.

1. **NEGLIGENCE: Collision: Noise of Approaching Train.** Plaintiff, driving a horse hitched to a buggy, stopped near the corner of a mill facing east, to transact some business. The horse became frightened at the loud and unusual noise of an approaching fast mail train running at high speed, became unmanageable, and collided with the rear coach of the said train. Before the collision, the plaintiff was thrown out and severely injured. The horse was killed, and the buggy wrecked. *Held*, that the noise that caused the plaintiff's horse to run away, and thereby injure it, was the result alone of the noise inseparable from the speed of the train, therefore, the plaintiff could not recover.
2. ———: **Rate of Speed: Recovery.** The rate of speed of a railroad train does not, of itself, constitute negligence, but actual negligence must be shown in order to authorize a recovery.
3. ———: **Unusual Noise: Testimony: Witnesses.** The testimony of witnesses, that the train made a loud and unusual noise has no probative force, because the noise of a train is commensurate with its speed.

Appeal from Pettis Circuit Court.—*Hon. H. B. Shain*, Judge.

REVERSED.

C. D. Corum for appellant.*Chas. E. Yeater* for respondent.

BROADDUS, P. J.—This action is to recover damages plaintiff sustained on account of the alleged negligence of the defendant.

The facts are as follows: On the 26th day of October, 1910, the plaintiff, who lived near Lamonte, Missouri, came in his buggy drawn by a gentle horse

into the town on business, and stopped at or near the east corner of a warehouse fronting east. A mill was situated just west of the warehouse where plaintiff had gone to get a sack of flour, and he was directed to go to the east front of the warehouse where it would be delivered to him. When he got around the east corner his horse became alarmed and ran east to Walunt street, a street located north and south, then turned southeast for a short distance, then almost east until near the east side of the street, where it turned south and ran into the rear coach of defendant's passenger train, which was going west at a rapid rate of speed. Before the collision, plaintiff was thrown out of the buggy and severely injured. The collision killed the horse, and wrecked the buggy. The plaintiff testified that he did not remember what occurred after he got around to the front of the warehouse.

The train in question was a fast mail train, and was running at a speed of fifty or sixty miles an hour.

The grounds of negligence alleged in the petition were four in number, the second of which, that the train was operated through the city of Lamonte in excess of the rate of speed of ten miles an hour, as provided by an ordinance, was withdrawn from the jury.

The first ground alleged for recovery is, that the train was run through the city at an unusual rate of speed, which caused a sudden loud roar and an unusual and extraordinary noise, terrifying to horses ordinarily safe in proximity to trains. The third: That the train was operated through the city without ringing the bell or sounding the whistle eighty rods from the crossing. The fourth: That the train was operated without giving such bell or whistle signals as would be sufficient to warn persons of the danger and give them the opportunity of getting to a place of safety.

The answer was a general denial and a plea of contributory negligence.

The evidence of plaintiff tended to show that the train made a loud and unusual noise; that the usual signal was given of the approach of the train at the usual distance from the station, and at the street crossing before reaching it, and it was shown that the bell was rung while the train was passing through the city.

Under the instructions of the court the finding and judgment were for the plaintiff, and the defendant appealed.

Many questions are raised and discussed by counsel, but the principal one is, whether, under the pleadings and evidence, plaintiff was entitled to recover. It is conceded that the train was running at a rapid rate of speed, but, as a matter of law, the rate of speed of a railroad train does not, of itself, constitute negligence. [Wallace v. Railroad, 74 Mo. 594; Maher v. Railroad, 64 Mo. 267.] According to these authorities, actual negligence must be shown in order to authorize a recovery.

The plaintiff's action is not predicated on the mere rate of speed at which the train in question was running, but, upon the other fact, that it was making a loud and unusual noise, which had the effect of alarming plaintiff's horse, causing him to run away, resulting in injury to the plaintiff, the killing of the horse and the wrecking of the buggy.

The witnesses did not undertake to say what caused the train to make an unusual noise. There was nothing to show that its equipment, consisting of an engine, baggage, mail and passenger cars, was other than was in ordinary use by defendant for the service in which it was then engaged. There was no proof that the engineer permitted the escape of an excessive amount of steam, or that the sounding of the whistle and the ringing of the bell were unusually or unnecessarily loud.

The theory of plaintiff, as shown by an instruction given at his instance by the court, was, that if defendant ran its train at an unusual and extraordinary rate of speed "which caused a sudden loud roar and an unusual and extraordinary noise, terrifying to horses ordinarily safe when close to trains operated in the usual and ordinary manner and speed, and if they further believe that plaintiff's horse was as gentle as the ordinary horse and was accustomed to trains operated in the usual and ordinary manner and speed, and if they also believe plaintiff's horse suddenly became terrified at such sudden loud and unusual and extraordinary noise," and ran away, etc., the verdict should be for the plaintiff. Analyzed, plaintiff's theory is nothing more nor less than the rapid rate of speed of the train, which caused the loud and extraordinary noise.

The testimony of witnesses, that the train made a loud and unusual noise, has no probative force, as it must be admitted, everything else being equal, that the noise of a train commensurate with its speed. And it may perhaps have been true, as stated by witnesses, that the train made more noise than it usually did, but this is entitled to no weight whatever for the same reason.

This is not like instances where the engineer of a train sees a person in peril on or near the track, and is required to stop or slow down his train to avoid injuring him. The plaintiff was not on or near the track in sight, and the engineer could not know that the noise made by the speed of the train would alarm his horse and cause it to run away. After all, the plaintiff's right to recover rests upon the fact that the noise that caused his horse to run away, and thereby injured it, was the result alone of the noise inseparable from the speed of the train.

In view of the foregoing conclusion, it is unnecessary to comment upon other questions raised in the

briefs and arguments of the respective sides to the controversy. It follows, therefore, that the judgment stands reversed. All concur.

HERMAN HESS, Defendant in Error, v. HERMAN
EHRlich et al., Plaintiffs in Error.

Kansas City Court of Appeals. October 7, 1912.

CONTRACTS: Rescission: False Representations. Plaintiff purchased billiard and pool tables for a given price, part of which was paid in cash and an installment note given for the balance secured by mortgage on the tables. Ten months later plaintiff offered to return the property and demanded the amount already paid because of false representations as to the kind of cushions to be furnished with the tables. Upon the refusal of defendants to take the tables and refund the money, plaintiff brought suit. It is *held*, that upon consideration of all the evidence, plaintiff made no sufficient offer to rescind and no right to rescind existed at the time of the alleged rescission.

Appeal from Buchanan Circuit Court.—*Hon. C. A. Mosman*, Judge.

REVERSED AND REMANDED.

Spencer & Landes and *Vinton Pike* for plaintiffs in error.

F. B. Fulkerson, J. A. Graham and *Hugh C. Smith* for defendant in error.

BROADDUS, P. J.—This suit arose out of a contract whereby the defendant sold to plaintiff certain billiard and pool tables and bowling alleys. The agreed price was \$2500 of which sum a part was paid in cash and the remainder was to be paid in fourteen

monthly installments, each evidenced by a promissory note of plaintiff and secured by a mortgage on the property. The contract was in the form of an order, dated June 28, 1908, but the tables and alleys were not installed in plaintiff's place of business in the Robidoux Hotel in St. Joseph until the 15th day of September, 1908. Payments were made on the notes during the months of October, November, December, January, February and March following.

The plaintiff seeks to recover on the ground that defendants made fraudulent representations and warranty as to the character of the cushions to be put upon the tables before delivery. That is, they were to be "Monarch" cushions, whereas the defendants substituted inferior cushions. Plaintiff alleges that upon the discovery of the deception so practiced upon him by defendants, he tendered back to defendants said tables and bowling alleys and other property and rescinded said contract and demanded a return of the money he had paid as aforesaid to defendants for said property.

The written order signed by plaintiff contains no description of the kind and character of the tables, cushions and bowling alleys except the dimensions of five pool tables and one billiard table are given. A change, however, was made on delivery as to number of tables of the two kinds mentioned and four pool tables and one billiard table were delivered. No change was made in the prices. The order contains the following: "Purchasers are hereby notified that all articles bargained for must be enumerated on the contract before signing, and only such goods will be furnished as are herein mentioned. All claims for shortage or noncompliance with the contract must be made within five days of delivery of the goods."

There is no dispute but what there was a plate on a rail of each of the tables mentioned on which was inscribed the words "Dan Patch Cushion." Plaintiff

testified that defendant agreed to put in tables with "Monarch" cushions and that when they were installed he discovered on the rails of the tables a plate on which was inscribed the words "Dan Patch Cushion." He was asked if he ever inquired of defendants or of anyone else what this mark on the plates meant and answered, "They didn't mean anything to me, they had promised to give me 'Monarch' cushions and I supposed that they had put them on."

Plaintiff introduced evidence tending to show that on June —, 1909, he offered to return the property to defendants and notified them that he had rescinded the contract. On the side of defendant the evidence tends to show that defendants took possession of the property under the mortgage for default in the payment of some of the notes given for the purchase price of the property.

The plaintiff's petition is in two counts. The first is based on the ground of false representation as to the kind of cushions to be furnished with said tables. The second count is based upon a breach of warranty of the contract for the sale of the property. In each instance the prayer is to recover the money paid for the property and interest thereon. The evidence showed that plaintiff had paid various sums on his contract which amounted to \$891. The jury returned a verdict for said sum with interest which amounted to \$964.07. From the judgment rendered on the verdict defendants appealed.

It is plain to be seen that the cause must be reversed. In the first place the plaintiff, after having used the property for a period of about ten months, had no right to tender it back to defendants without also tendering at the same time a reasonable sum for its use. This is too plain for comment. Besides we do not think he had any right to rescind the contract. Any man with ordinary sense would have known from the start that the tables were not equipped with "Mon-

arch" cushions because the plates on the rails said in plain letters that they were "Dan Patch" cushions. The statement of plaintiff that the inscription on the plates meant nothing to him will hardly be received as true because it is incredible. We, therefore, hold that there was no sufficient offer to rescind and no right to rescind at the time of the alleged rescission.

But plaintiff has the right to maintain his action for breach of warranty. We believe the written order in evidence did not contain all the contract and that it was not the intention of the parties that it should. It is hardly probable that the tables were bought without some understanding as to their description, character, material, etc. However, plaintiff's measure of damages in such case would be the difference between the value of the tables as they were represented and the actual value at the time of the delivery.

Many questions are raised and discussed in the respective briefs but the case when reduced to its last analysis is free from any complications, and from what has been said it will be no trouble in another trial to place the issue before the jury in a single instruction. For the reasons noted the judgment is reversed and the cause remanded. All concur.

**JAMES W. ROBERTS, Appellant, v. SOUTHERN
PACIFIC COMPANY, Respondent.**

Kansas City Court of Appeals. October 7, 1912.

1. **NEGLIGENCE: Trespasser.** A person who obtains a free passage from an engineer and rides on the back of the engine, even though directed to do so, is a trespasser, and entitled only to demand that he be not wilfully and recklessly injured.
2. **———: Ordinary Care.** The failure to exercise ordinary care, after it is discovered that a person is in peril, amounts to a

degree of reckless conduct that may well be termed willful and wanton.

3. ———: ———: It is not negligence to stop a train suddenly, with jars more or less severe, as they are ordinary incidents to the movements of the trains.

Appeal from Jackson Circuit Court.—*Hon. James A. Goodrich*, Judge.

AFFIRMED.

Horace Kimbrell and *Martin J. O'Donnell* for appellant.

(1) The court erred in granting a new trial on the ground that it should have instructed the jury that defendant owed plaintiff no duty except not to wilfully and recklessly injure him after becoming aware that he was in peril for the reason that the laws of California and Missouri are exactly similar on the measure of duty owing to a person discovered to be in peril and that duty is to exercise ordinary care to avoid injury to such person after discovery or knowledge of the peril. *Esrey v. Railroad*, 103 Cal. 544; *Everett v. Railroad*, 214 Mo. 54; *Cole v. Railroad*, 121 Mo. App. 612; *Henderson v. Railroad*, 89 Pac. 980; *Harrington v. Railroad*, 140 Cal. 514; *Sauger v. Brewing Co.*, 84 Pac. 428; *Ford v. Railroad*, 50 Pac. 27; *Lee v. Railroad*, 67 Pac. 765, 766; *Kram v. Railroad*, 86 Pac. 904; *Anderson v. Railroad*, 99 Pac. 98; *Everett v. Railroad*, 46 Pac. 891; *Herbert v. Railroad*, 53 Pac. 652; *Sego v. Railroad*, 70 Pac. 280; *Green v. Railroad*, 76 Pac. 722-23-30; *Bennichesen v. Railroad*, 84 Pac. 421; *Kram v. Railroad*, 86 Pac. 742; *Rowe v. Railroad*, 87 Pac. 221-22; *Cordiner v. Traction Co.*, 91 Pac. 438; *Doherty v. Navigation Co.*, 91 Pac. 421; *Ruppel v. Railroad*, 101 Pac. 805; *Spear v. Railroad*, 117 Pac. 966. (2) The trial court erred in holding that under the decisions of the California courts the

only duty owing to plaintiff was not to willfully and wantonly injure him and in holding that it was necessary to show that the act causing plaintiff's injury was intentionally, wantonly and willfully as well as carelessly and negligently done. *Kram v. Railroad*, 86 Pac. 904; *Henderson v. Railway*, 89 Pac. 980; *Richmond v. Railroad*, 18 Cal. 351; *Lynch v. Nurdin*, 1 A. & E. N. S. 30; *Buck v. Railroad*, 46 Mo. App. 566; *Holmes v. Railroad*, 97 Cal. 169; *Davies v. Mann*, 10 M. & W. 545; *Adams v. Ferry Co.*, 27 Mo. 95; *Needham v. Railroad*, 37 Cal. 409; *Hall v. Railroad*, 219 Mo. 553; *Parish v. Railroad*, 140 Mo. App. 702; *Matz v. Railroad*, 217 Mo. 299, 300.

Douglass & Watson for respondent.

BROADDUS, P. J.—This is a suit to recover damages for injuries sustained by plaintiff as the alleged result of defendant's negligence. The defendant corporation was engaged as a carrier in operating a railroad between the towns of Colfax and Applegate in the state of California.

On the 28th day of October, 1908, the plaintiff took passage on one of defendant's engines at Colfax, his destination being Roseville. According to plaintiff's evidence, he told the engineer he had no money and asked him to let him ride to Roseville, where he expected to get work; that after some talk with the fireman the engineer said: "Well, get on the back end of the engine there and ride;" that at once he went around the back end of the engine and got on a foot-board; that there was a rod there on which to hold; that soon thereafter the train pulled out; that in about fifteen or twenty minutes the engineer, while stopping the train, gave it a violent and sudden jar which threw him up against the engine, and, as described by him in his own language, "threw me out and broke my hold

and threw me over on the track and the next thing I knew I was lying beside the engine." He testified that he thought the position he took on the engine was safe from danger.

The ground upon which plaintiff asks to recover is that the engineer knew of his perilous position, and that the train could have been stopped without the violent and sudden jar by the use of ordinary care, that is, by shutting off the steam and applying air.

The defense is that plaintiff was a trespasser and, as such, under the laws of California, it owed him no duty except not to willfully and deliberately injure him.

The plaintiff in reply pleaded that under the statutes of California the defendant owed to the plaintiff the same care as if it had received a reward for carrying him. The jury returned a verdict for plaintiff in the sum of \$7000, which the court, on motion of defendant, set aside. The plaintiff appealed from the order of the court setting aside the verdict of the jury and granting a new trial.

The case was tried upon the theory that the court believed to be the law of California. It was the insistence that the law governing the question in the state of California was similar to that of Missouri. We shall not enter into the reasons the court gave in the written opinion in sustaining the motion for a new trial, as we find it more convenient to pass upon the controlling question, viz.: the right of plaintiff to recover under his evidence.

In California there are special provisions in the code governing the relation of carriers and passengers. Section 2096 provides: "A carrier of persons without reward must use ordinary care and diligence for their safe carriage."

Section 2090, *idem*. "A carrier without reward who has begun to perform his undertaking must complete it in like manner as if he received a reward, un-

less he restores the person or thing carried to as favorable a position as before he commenced the carriage."

Section 2100, *idem*. "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

It is the contention of plaintiff that, under the law of California, he was in peril while upon the engine, and that the defendant failed to exercise due care to save him from injury, and, therefore, he is entitled to recover under the humanitarian doctrine.

Various decisions of the California courts were pleaded by plaintiff and defendant, and others are cited in support of their respective theories of the case.

Under the California Code the plaintiff was not a lawful passenger without reward, but a trespasser. In *Sessions v. Railroad*, 114 Pac. 982, it is held that: "A person who obtains free passage on a passenger train from the conductor by means of fraud or misrepresentation, with knowledge of the want of authority on the part of the conductor to allow such free passage, is not a lawful passenger without reward within Civil Code, section 2096, requiring ordinary care and diligence for his safe carriage, but is a mere trespasser, entitled only to demand that he be not willfully or recklessly injured." Thus we find that the law of California is similar to that in this state in reference to the duty of a carrier to a trespasser; that is, that the plaintiff being a trespasser, as such, the defendant was not required to use ordinary care for his safe carriage, but that, if it was discovered he was in peril, it was the duty of defendant to exercise ordinary care to prevent injuring him; and that if it failed to exercise such care it was guilty of wanton and reckless conduct. Or, as said in another case, the

failure to exercise ordinary care under such circumstances "amounts to a degree of reckless conduct that may well be termed willful and wanton." [Esrey v. Railroad, 103 Cal. 544.] The holding is similar in Missouri. [Everett v. Railroad, 214 Mo. 54; Cole v. Street Railway, 121 Mo. App. 605, and other cases.]

It is contended that the plaintiff was in peril from the time he took a position on the running board back of the engine until he was thrown therefrom by the force of the jar caused by the sudden stopping of the train; and that the act of the engineer in so stopping the train was willful and reckless, and, therefore, the plaintiff was entitled to recover. But do the facts bear out this construction? The plaintiff was not entitled, as held in the case of Sessions v. Railroad, *supra*, to ordinary care for his safety. If plaintiff was being carried in a dangerous position, it was one that he voluntarily assumed. He thought he could ride on the engine in safety. He knew, or must be held to have known, that in the stopping of trains it is not unusual for them to be stopped suddenly, accompanied with jars more or less severe. It was one of the ordinary incidents to the movement of trains, and not an act of negligence. Especially such must have been the course of events where the region was so mountainous and the grades so steep as to require two engines to move trains equipped as this one was. Perhaps it was necessary owing to the condition of the grade at the place of stoppage, or that other exigencies of the occasion required that the train be stopped suddenly. There was not a particle of evidence showing that the sudden stoppage and jar of the train were unnecessary or unusual. Furthermore, plaintiff stated that he thought his position was a safe one and the engineer must also have thought so; consequently, there was nothing in plaintiff's position to warrant the belief of either that he was in a position of peril. Such being the case, there was no reason why the en-

gineer should conduct the train other than in the ordinary manner in order to secure plaintiff's safety.

As has been said, the plaintiff being a trespasser, the provisions of sections 2090, 2096 and 2100 have no application. And, in our opinion, the principle governing the case is common not only to California and Missouri, but to most of the states.

The plaintiff has not made out a case under any honest theory of the law, but his right to recover is repugnant to both reason and justice. Affirmed. All concur.

MARY LILLIAN HUTTON, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY,
Appellant.

Kansas City Court of Appeals. October 7, 1912.

1. **NEGLIGENCE: Alighting from Street Car: Admissions.** Plaintiff sued for damages for injuries she received when an electric street car started before she had alighted therefrom, and she was thrown to the street. She stated repeatedly, on direct and cross-examination, that the car started just as she was in the act of stepping down to alight, but finally in answer to a leading question as to whether she started to get off the car after it started, coupled with another question whether or not a man swung on to the car against her just before she started to get off, she answered, "yes." Held, that plaintiff was misled by the question, and the court properly refused to direct a verdict for the defendant.
2. **WITNESS: Remarks of Court.** The remark of the trial judge that it would be fair to a witness to be permitted to read a statement before she made answer to a question concerning its contents, was not prejudicial.
3. **EXPERT WITNESS: Hypothetical Question.** It is not error to allow a doctor to answer, a hypothetical question as to whether, under the facts in evidence, the injury to plaintiff in falling from the car could have produced the condition he found her in when he examined her, that: "It could, that kind of a fall."

Appeal from Jackson Circuit Court.—*Hon. James H. Slover*, Judge.

AFFIRMED.

John H. Lucas and *Piatt & Marks* for appellant.

(1) For the action of the trial court in charging defendant with unfairness and compelling it to deliver to plaintiff her signed statement before defendant had used it or attempted to use same, this case must be reversed. *Levels v. Railroad*, 196 Mo. 606; *Rose v. Kansas City*, 125 Mo. App. 231; *Steltemier v. Barrett*, 115 Mo. App. 323. (2) Plaintiff's admission that the car had started before she got out is conclusive against her. *State v. Brooks*, 99 Mo. 137; *Cogan v. Railroad*, 101 Mo. App. 179, 189; *Shanahan v. Transit Co.*, 109 Mo. App. 228; *Diamond v. Kansas City*, 120 Mo. App. 185. (3) Under the proof made of injuries received, the verdict is excessive and must be set aside. *Lofink v. Transit Co.*, 94 N. Y. Supp. 150; *Ry. Co. v. Freedman*, 46 S. W. (Tex.) 101; *Brake v. Kansas City*, 100 Mo. App. 611. (4) This case should be reversed for the action of the court in permitting the medical expert to answer an illegal and improper hypothetical question, over defendant's objection. *Holtzen v. Mo. Pac.*, 140 S. W. 767; *Charles H. Moore, Adm., Respondent*, 1 Mo. Pac. Ry., Appellant, No. 9732, March Term, 1911, Kansas City Court of Appeals; *Smith v. Kansas City*, 125 Mo. App. 158; *Baehr v. Casualty & Surety Co.*, 133 Mo. App. 543; *Sutter v. Kansas City*, 138 Mo. App. 113; *Roscoe v. Street Railway*, 202 Mo. 576; *Smart v. Kansas City*, 208 Mo. 162, 200; *Glasgow v. Street Railway*, 191 Mo. 358, 364; *Taylor v. Railroad*, 185 Mo. 239; *State v. Hyde*, 234 Mo. 200, 253.

Cowherd, Ingraham, Durham & Morse for respondent.

(1) The trial court followed the well settled rule in requiring defendant's counsel to show plaintiff her alleged written statement before questioning her as to whether she made certain allegations therein. *Prewitt v. Marlin*, 59 Mo. 325-334; *Wilkerson v. Eilers*, 114 Mo. 251-252; *State v. Talbot*, 73 Mo. 358; *State v. Meyers*, 198 Mo. 255. (2) The so-called conclusive and fatal admission of plaintiff was only a word given in answer to a double barreled question put to her in a rapid fire cross-examination. The whole testimony of plaintiff shows she either did not understand the question or was confused. *Black v. Street Railway*, 130 Mo. App. 551. (3) The verdict is very modest when the permanency of the injury and the amount of pain and disability is considered. (4) Plaintiff's hypothetical question as it was finally put and the answer given thereto, were in proper form. *Baehr v. Casualty Co.*, 138 Mo. App. 113; *Taylor v. Railroad*, 185 Mo. 239; *Bragg v. Street Railway*, 192 Mo. 331; *Lutz v. Street Railway*, 123 Mo. App. 502; *Oneil v. Kansas City*, 178 Mo. 91; *Bragg v. Street Railway*, 192 Mo. 331; *Kinlen v. Railroad*, 216 Mo. 173; *Orr v. Bradley*, 126 Mo. App. 152. (5) Permitting leading questions to be asked is a matter entirely for the discretion of the trial court. *State v. Bateman*, 198 Mo. 222; *State v. Knost*, 207 Mo. 23; *Chaney v. Ins. Co.*, 62 Mo. App. 48. (6) Plaintiff's instruction 1 correctly declares the law of this case on the question of defendant's liability. *Hufford v. Street Railway*, 130 Mo. App. 644; *Black v. Street Railway*, 130 Mo. App. 551; *Green v. Street Railway*, 122 Mo. App. 649; *Nelson v. Railroad*, 113 Mo. App. 709; *Jerome v. Railroad*, 155 Mo. App. 205; *Ridenhour v. Railroad*, 102 Mo. 281; *Hurley v. Street Railway*, 120 Mo. 267.

BROADDUS, P. J.—Action for damages. The plaintiff claims she was injured while stepping off one of defendant's street cars near the intersection of

Twelfth and Cherry streets in Kansas City, Missouri, on June 16, 1909.

The plaintiff is a young woman, at the time of her injury twenty years of age, weighing 160 pounds, and by occupation a milliner's maker. At about 7:30 a. m., of the day she was injured, she boarded a west bound car on Twelfth street for passage to said intersection of Twelfth and Cherry streets. Her evidence went to show that when the car arrived at said intersection, it stopped at the usual place for passengers to get on and off.

The main controversy is whether she attempted to get off the car while it was standing or while it was in motion, and it is urged by appellant that plaintiff's own statements, taken as a whole, show that she got off the car after it had started.

Her testimony was to the effect, that the car and both vestibules were crowded; that, before she reached her stopping place, she signaled the conductor to stop by pressing on the push button, which was the usual way for passengers to signify that they wanted the car to stop for them to get off. She testified, in answer to a question as to what happened, as follows: "Well, as the car neared Cherry street I arose from my seat and started to the back of the car, as it was crowded. I stepped down in the vestibule and pushed past the conductor, who was standing there, and as the car stopped at Cherry street I stepped to the door to get off, and before I could step down a man wanted on and swung up, and I had to push back until he could step down or step on; as soon as he took his arm away from the rod I started to step off, but before I stepped down from the car the car started and threw me to the street."

On cross-examination she was asked: "Where were you when the car started? A. I was stepping down from the car to the street.

Q. "How long would you say—they came to a full stop, didn't they? A. Yes, it stopped just long enough for this man to get on and for me to start to get off.

Q. "How long would you say the car stopped there, a matter of a minute and a half or two minutes? A. Possibly a minute.

Q. "Did you make any statement to the company about this accident? A. Yes, sir.

Q. "Did you read it over before you signed it? Did you read it? A. Yes, sir.

Q. "Don't you remember in that saying that some man jumped on the car as you were getting off?"

Plaintiff's counsel insisted that his client should be permitted to read the statement before she answered the question. The defendant's counsel consented that the witness might read the particular statement referred to, but objected to her reading the entire statement. The court ruled that she might read the entire statement, and said that would be fair to the witness. To this action of the court, defendant excepted.

The witness denied that the signature to the writing offered was her own, but she admitted, practically, that all the statements it contained were correct.

After a number of questions, some of which referred to the man getting on the car about the time plaintiff was preparing to get off, defendant's counsel asked: "You were out there to get off and he swung up there to get in? A. Yes, sir.

Q. "And he swung in against you and you got out after the car started and you fell? A. Yes, sir."

The written statement was given in evidence by defendant. It corresponds, in every essential particular, with the plaintiff's evidence, except as to the answer to the last foregoing question.

Charles Bassett, whose place of business was near the intersection of the two streets, testified; that the

car stopped at the usual place for stopping; that he was standing outside of his shop and saw the plaintiff fall and helped to pick her up; that he say one man get on the car as the plaintiff fell off; and that the car was in motion while she was falling.

The plaintiff did not appear at first to have been seriously injured, but her evidence and that of her witnesses tend to show that in a short time thereafter it was disclosed that her injuries were very severe, and resulted in permanent disability.

The defendant's conductor and motorman in charge of the car at the time both testified that it did not stop at the usual place for stopping—the intersection of Cherry and Twelfth streets.

Several persons, who were passengers on the car at the time, testified that the car did not stop and that plaintiff stepped or fell off while it was in motion. And other evidence tending to contradict that of plaintiff was also introduced by the defendant.

Doctor Longan, who had examined the plaintiff and learned the history of her case, and who found a partial displacement of her womb, was asked the following question: "Doctor, I will ask you whether, if a lady, twenty years of age, was thrown while stepping off a street car when she was in the act of alighting, falling upon the right knee and left side, whether such a fall would or would not produce such a displacement of the womb as you found in this patient when you made the examination? A. It could, that kind of a fall."

Instruction No. 1 given for the plaintiff, and to which exceptions are taken by defendant, reads as follows: "If you find and believe from the evidence that on the 16th day of June, 1909, defendant was engaged in the operation of a street railway on Twelfth street in Kansas City, Missouri; that plaintiff was a passenger on one of defendant's cars in said city going west; that it was customary for passengers on said cars to

notify the employees in charge of the same when they wished to alight from said cars by pushing a button provided for such use; that before reaching Cherry street plaintiff notified the conductor in charge of said car that she wished to get off at said street by pushing such button; that said car stopped at Cherry street; and the plaintiff started to get off the same; that while she was in the act of getting off said car, and in the exercise of ordinary care, if you find she was exercising such care, the servants and employees of defendant in charge of said car negligently and carelessly started the same before she had reasonable opportunity to alight therefrom and she was thereby thrown to the ground and injured, then you will find for the plaintiff and assess her damages at such sum as you may believe will reasonably compensate her for such injuries as you may believe from the evidence she has received, if any, not to exceed, however, the sum of \$10,000."

The defendant asked and the court refused a demurrer to plaintiff's case. The jury returned a verdict for the plaintiff in the sum of \$3000. From the judgment on the verdict, defendant appealed.

It is contended that the plaintiff's admission that the car had started before she attempted to get off bars her right to recover, and defendant has cited numerous decisions to the effect that solemn admissions made in open court, whether orally or by written pleadings, are binding upon the party making them. The law in that respect is so well settled that comment is unnecessary.

If the plaintiff's evidence is to be taken as an admission that she attempted to get off the car after it started, she ought not to be permitted to recover, as the injuries she sustained were the result of her own negligence.

Plaintiff stated repeatedly on examination, and on cross-examination, that the car started just as she was

in the act of stepping down to alight. And she made a similar statement in the writing she made to the company. Finally, after having been cross-examined more than once and the matter gone over several times, in answer to a leading question by the defendant's counsel as to whether she started to get off the car after it started, coupled with another question, whether or not a man swung onto the car against her just before she started to get off, she answered, "yes."

Was it for the court, under the circumstances, to direct the jury to return a verdict for the defendant on the theory that the answer was a solemn admission that she attempted to get off after the car had started? We think not. The most indisputable inference to be drawn from her previous testimony and statement read in evidence is, that plaintiff was misled by the question, and the answer was only in response to that part of the question, whether a man swung onto the car and against her when she was preparing to alight. A double leading question, one which the witness would answer in the negative and the other in the affirmative if asked separately, is liable to be answered, yes or no. This is well known by the judges and practitioners at the bar. It would be going outside of our duty to hold, in such instances, that the witness should be concluded by such a mode of questioning.

It is claimed by defendant that the court's remarks, made to defendant's counsel when he asked if she had not made certain statements, were calculated to prejudice the defendant in the minds of the jury. It is insisted that the court charged the counsel with being unfair with the witness when the ruling was made that the statement which was in writing should first be submitted to the witness for her inspection before making answer. But we do not understand that the record shows that the court made any such remark. The remark was, that it was fair to the witness that she should be permitted to read the statement before

she made her answer; and that is the law. And the remark was not equivalent to saying that the counsel was unfair, and we know of no authority that would prevent a judge under the circumstances as characterizing the act as unfair to the witness, when, as in this instance, the counsel persisted against the ruling of the court that the witness should not answer the question before she had had the opportunity of reading the statement. The court would have been justified in reprimanding or imposing a fine upon him for his conduct.

There was no error in the action of the court in allowing Dr. Longan to answer the hypothetical question as to whether, under the facts in evidence, the injury to plaintiff in falling from the car could have produced the condition he found her in when he examined her, and his answer that: "It could, that kind of a fall." The question and answer were proper under the authorities, and the answer certainly was merely the expression of an opinion and not a conclusion. The rule is clearly stated in *Taylor v. Railroad*, 185 Mo. 239, and followed by this court in *Holtzen v. Railroad*, 159 Mo. App. 370, and such is the holding in many other cases.

Two objections are raised to plaintiff's first instruction. First, that "It directs a verdict for plaintiff, if defendant failed to hold the car still sufficiently long to give plaintiff a reasonable opportunity to alight therefrom; in other words, if the car made a stop and start so nearly simultaneously as not to allow sufficient time between said event for a passenger to alight, then the passenger had the right to alight while the car was in motion, and, if thrown by so doing, he is entitled to recover." The defendant attempts to apply its theory to a supposed state of facts, and not to the facts in proof, and, therefore, has no bearing on this case. The theory, after all, is but saving that a passenger is not justified in attempting to alight from

a car while it is in motion, which no one disputes. But, if the act of the passenger in attempting to alight is simultaneous with that of the starting of the car, the passenger is not to be charged with negligence for his act, and it is negligence on the part of the carrier to start the car under such circumstances.

The second objection is, that it permitted the jury to assess damages for inflammation of plaintiff's womb and for dizzy headache, which were purely conjectural and not shown to have been the result of the injury.

To trace the results of a fall from a car onto the streets of a city is, in many cases, a difficult matter. Direct and positive evidence is, in many cases, impossible, and the best that we can do is to trust to the evidence of medical experts and to the symptoms as they may develop from time to time. We know that an injury to one part of the human anatomy produces a serious but unexpected result upon some of its other parts, but are unable to account for it. The medical expert, by reason of his education and experience, is enabled, in such instances, to trace the result to the injury. It was by this kind of evidence plaintiff sought to make out her case, and we are not prepared to say it had no probative force, but, on the contrary, we believe it had.

While the preponderance of the evidence was greatly in defendant's favor, and the plaintiff was not as frank and consistent as she should have been, we are not authorized, under the law, to interfere with the verdict of the jury, as they were the sole judges as to the weight of the evidence and the credibility of the witnesses.

Many of the questions raised in defendant's argument are nonessential and will not be noticed. Finding no error in the trial, the cause is affirmed. All concur.

JAMES M. TURLEY, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals. October 7, 1912.

1. **NEGLIGENCE: Injuries to Passengers: Alighting from Car.** Plaintiff was in the act of getting off a street car at a regular stopping place, but before he could get down, the car started and threw him to the pavement. *Held*, that if plaintiff told the truth concerning the manner in which he was injured, he was entitled to recover and the truth of his testimony was a question for the jury.
2. **INSTRUCTIONS: Construed as a Whole.** It is not proper to disjoint an instruction and construe it with reference to the separate parts, but it should be considered as one.
3. **VERDICT: Not Excessive.** Where the injuries consist of two broken ribs, injuries to hip and pain of body and mind suffered, a verdict for \$1500 is not excessive.

Appeal from Jackson Circuit Court.—*Hon. James E. Goodrich, Judge.*

AFFIRMED.

John H. Lucas and Charles N. Sadler for appellant.

Boyle & Howell and W. F. Woodford for respondent.

BROADDUS, P. J.—This is a suit for damages for an injury suffered by plaintiff as the alleged result of defendant's negligence. The plaintiff's petition, after setting out that the defendant was a corporation operating street cars in Kansas City, Missouri, and other preliminary matters, alleged for his cause of action the following: "That on or about the 28th day of September, 1907, the plaintiff was a lawful passenger on one of defendant's eastbound cars running

over and along Tenth street; that when said car had reached a point at or near the intersection of said Tenth street with Cherry street it was stopped by defendant for the purpose of permitting plaintiff to alight from said car; that while said car was so stopped at said place, plaintiff did attempt to alight from said car, and while in the act of so doing, and before he had reasonable time in which to do so, defendant carelessly and negligently started said car forward, and thereby caused plaintiff to be thrown from said car upon the pavement of said Tenth street, and thereby caused him to be injured as follows." The answer was a general denial.

The plaintiff, who was the only witness as to how the injury occurred, was a man about eighty years of age. His statement was to the effect; that he boarded the car at Tenth and Walnut streets and took a seat near the rear vestibule; that when the car arrived at Cherry street a signal was given for it to stop; that he did not recollect whether he or the conductor gave the signal; that the car stopped; that he started to get off, and, as he went down the step, he put his foot out, but before he could get it down, the car started and threw him to the pavement on the street. The time of the occurrence was between eleven and twelve o'clock at night.

The plaintiff's injuries, according to the testimony of Doctor Smith, who attended him, consisted of a fracture of two of his ribs and some bruises on his body, head and hips. It was the opinion of the doctor that plaintiff had not then, at the date of the trial on the 31st day of October, 1910, entirely recovered from the effects of his injuries.

The defendant introduced evidence to show that no report of the accident was made by any of the employees of the company operating cars on the Tenth street line at or about the time mentioned.

Dr. Castelaw, who was sent by the defendant to examine plaintiff, testified that plaintiff would not let him do so; that he told witness that he walked off a car in motion near an alley on Tenth street between Cherry and Holmes and had fallen and hurt his side; that his physician told him he had two of his ribs broken.

Thos. F. McAnany, a private detective, who was then, but not now, an employee of defendant, testified; that he had a talk with the plaintiff in the month of September, 1908, who said he did not exactly know how the accident happened; that he said, "he didn't remember much about the accident. He had been drinking that night, he said, down on Independence avenue and got on a car at some place and fell off, and talked something about two people taking him home." "Q. He told you that he did not remember how it happened. A Yes, sir, that his mind was a blank." This conversation was after the commencement of this suit.

There was other evidence of a contradictory character. The plaintiff testified that he had been drinking some, but that he was entirely sober.

The defendant offered a demurrer to the plaintiff's case at the close of his testimony, and also at the close of all the testimony, both of which were by the court overruled.

The court instructed the jury for the plaintiff as follows: "The court instructs the jury that if you believe and find from the evidence that the plaintiff was a passenger upon a car of defendant at the time he claims to have been injured, then, having received plaintiff upon board of said car, the due obligation of the defendant to plaintiff was to use the highest degree of care practicable among skillful and experienced men in that same kind of business to carry him safely, and a failure of the defendant, if you believe there was a failure, to use such highest degree of care would con-

stitute negligence on its part; and defendant would be responsible for all injuries resulting to plaintiff, if any, from such negligence, if any. And if you believe and find from the evidence that on or about the 28th day of September, 1907, that while plaintiff was a passenger on said car that when said car had reached a point at or near the intersection of Tenth street with Cherry street in Kansas City, Missouri, said car was stopped by defendant for the purpose of permitting plaintiff to alight from said car, and that while said car was so stopped at said place plaintiff did attempt to alight from said car, and while in the act of so doing, and before he had a reasonable time in which to do so, defendant carelessly and negligently started said car forward, and thereby caused plaintiff to be thrown from said car and upon the pavement of said Tenth street, and thereby caused him to be injured, and that plaintiff was in the exercise of ordinary care for his own safety while attempting to alight from said car, then your verdict should be for the plaintiff."

Instruction No. 7 was given on the question of plaintiff's measure of damages. The jury returned a verdict for the plaintiff in the sum of \$1500 From the judgment defendant appealed.

Defendant makes the following assignments of errors: First, that the court erred in overruling its demurrers to plaintiff's case. Second, that the giving of said instructions 6 and 7 was error. Third, that the verdict of the jury is excessive and unjust.

The demurrers were properly overruled. If the plaintiff told the truth, he was entitled to recover, and that was a question for the jury. The verdict is conclusive upon this court, and, therefore, there is no necessity for saying more.

The objection to instruction No. 6 is that it is not limited to the issues made by the pleadings; that it assumes disputed facts; and that it is misleading, confusing, argumentative, and repugnant on its face. If

the instruction is to be considered by its parts, and not as a whole, the objection would be good, as it would be too general and not confined to the question of the special allegation of negligence pleaded. [Detrich v. Railroad, 143 Mo. App. 176.] That is a question that need not be discussed.

It is not proper to dissert an instruction and construe it with reference to the separate parts, but it should be considered as one. The first part of the instruction, defining the degree of care the defendant owed the plaintiff as a passenger, and the statement that the failure of defendant to exercise such care constituted negligence for which the defendant would be responsible, is but a statement of the law generally. And it was said in Detrich v. Railroad, *supra*, that it was misleading and erroneous where special negligence was relied on, there being no other instruction directed to the issue of such special negligence. But here the instruction was directed to the allegation of specific negligence. The instruction as a whole is sound. The jury could not have been misled.

Instruction 7 limits plaintiff's claim for damages to pain of body and mind which he may have suffered from injuries, if any, to his right hip and two ribs on the right side of his body. As a matter of fact, it is as free from defendant's objection as it is possible to make it.

If plaintiff had two ribs broken, his hip injured, and suffered pain of body and mind, it seems to us that a verdict of \$1500 is not excessive. It maybe and probably is unjust, as the great preponderance of the testimony was to the effect that plaintiff did not receive his injuries as he alleges, but the jury thought differently. Finding no error, the judgment is affirmed. All concur.

JOHN O'DOWD, Respondent, v. WABASH
RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals. October 7, 1912.

1. **BILLS OF EXCEPTION: Time for Filing.** Under section 2029, R. S. 1909 as amended by the Legislature in 1911 (Session Laws of 1911, page 139), the appellant has an unqualified right to have his bill of exceptions signed and allowed at any time before he is required to serve the respondent with his abstract of the record.
2. **NEGLIGENCE: Master and Servant: Custom.** As a general rule, the master in conducting his business in the usual and customary manner, is not chargeable with negligence, but custom prevails upon the theory that experience has demonstrated that it is reasonably safe, and if an act is done in a negligent manner, it cannot be justified on the ground that it is the custom.
3. ———: ———. A switchman was injured while engaged in switching a car on to a track, at the other end of which another crew shoved in some cars that collided with the one in charge of plaintiff. The yards were so situated that the switching crew, at one end, could not see the plaintiff and his associates. *Held*, that under the evidence the court was fully justified in submitting the case to the jury upon the question whether or not the switching that caused plaintiff's injury was done in an negligent manner.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

AFFIRMED.

J. L. Minnis and Sebree, Conrad & Wendorff for appellant.

T. V. Conrad and T. A. Witten for respondent.

BROADDUS, P. J.—This is a suit for damages, the alleged result of defendant's negligence.

The plaintiff, an experienced switchman, while engaged as such in defendant's employ, was injured in September, 1908, in its Kansas City yards, immediately north of the Union Depot. He had been in defendant's employment for more than one year, and was familiar with the yards and the manner in which the business of switching was conducted. In the switch yards there are numerous tracks, but it will only be necessary to account for those that relate particularly to the issues of the case. There was a main track running through the yards from a northeasterly to a southwesterly direction, which is referred to as the lead track. But for convenience the ends of the track are designated as north and south. It connects with the Burlington Railroad tracks at the north end and extends through the yards in a circular manner to the westwards at the south end, so that a crew working at the south end would be unable to see the north end on account of cars standing on the west side of said track, and on other tracks in the yards. About two car lengths from the junction of the said track with the Burlington track, a track diverges from the lead track on the east side, known as track No. 8.

At the time of the accident, a string of cars was standing on track No. 8 and extending near enough to the lead track to leave just sufficient room for cars moving upon the lead track to clear them. There were two switching crews at the time working in the yards. The plaintiff, with one crew, belonged to the north end, the other crew at the south end.

The plaintiff and his crew were to move four cars on track No. 8 by taking three in their order, the first, third, and fourth, and drop them down the lead track and to replace the second on track No. 8. To do this, they uncoupled the first four cars on track No. 8 and drew them upon the lead track to a sufficient distance to clear the intersection with No. 8. They then uncoupled the two cars at the south end of these four

cars and dropped them down the lead track, while plaintiff, at the direction of the foreman, went upon the second car to ride it back upon track No. 8. After going upon this car and finding the brake in order, he looked down track No. 8 and, finding the cars standing still, gave the signal to uncouple the car. He adjusted his brake, saw the car was under his control, and then when he reached the switch leading to track No. 8, he again looked to see that the cars on it were still standing, whereupon he loosened his brake and gave the car sufficient speed to run it on track No. 8. At the same time the crew at the south end were shoving cars on track No. 8 northward. Plaintiff saw the cars moving towards him, but not in time to seek a place of safety before they collided with his car. In the collision he was thrown from his position and injured.

The plaintiff denied that, when passing track No. 8, he knew that the crew at the south end were shoving cars on said track northward. And he testified that, owing to a curve in the track and it being occupied with cars, the south crew could not see where he was working, and that he first discovered that the cars were moving north, meeting him as he was passing over the frog connecting the two tracks.

He was then asked if he looked any more. A. "Not for about another car length. I was busy setting the brake. I could not set up the brake and look at the same time, if I did, the car would stop." The grade was down hill. He said: "You have got to let off a little bit of the brake at a time, and ramble down that way. If you let it go, the car in five or six lengths would be going ten or fifteen miles an hour down that hill."

The evidence showed that there was space enough on the track for four other cars. The crew at the south end shoved two cars into this space, which caused the movement northward of the cars on the track until they

came in collision with the car going southward, on which plaintiff was placed.

Plaintiff was asked: "If you knew you had plenty of space to set in a car without cornering one on the other track would you send a man ahead of your string of cars? A. Not if I knew that I had plenty of room to spare—not necessarily—if I could see where we were going, but if you couldn't see ahead you have got to protect yourself and the company's property, etc.

Q. "Who would you be expecting to protect by sending the man in the field? A. If you knew there was another crew there, and didn't know exactly where they were at, you would get a man out there before you shoved up—if you cared for what you were doing—if you were looking out for the company's interest, and your fellow men.

Q. "You are saying, 'if the track was full.' I am saying if you had space for four cars, and only wanted to put in two, you would know that you could put in two cars in a space enough for four cars, wouldn't you? A. You could if the track was not full.

Q. "I say, if you had space enough for four cars, the track wouldn't be full then, would it? A. Yes, it might be.

Q. "How could it be full? A. That track would be practically full, if you wanted to shove in there around the curve—unless you find out there is no crew working at the other end." He was then asked to explain his meaning. His answer was thus. "There is a crew working at the other end, and you don't know but what they may drop two cars in at the other end, and you take two cars in, and you were figuring on space for four cars, and you haven't got it. You are not protecting yourself."

The defendant's evidence tended to show that the switching crew at the south end was working in the usual and ordinary manner employed by railroads under similar circumstances, that is, that it was the gen-

eral custom of railroads and the custom of defendant in its switching yards, where the tracks connect at both ends of the yard with a lead, as in this instance, for crews to switch at either end of the yard at the same time, and use the same track at the same time, and neither crew had any preference or right of way over the other crew. In other words, if there was a vacant piece of track, any crew had the right to move cars upon and occupy such space, regardless of where the other crew were or what they were doing.

In the collision plaintiff fell to the ground and sustained a sever injury to one of his hands. He suffered much pain, and was unable to work for a period of six months. He testified, that at the time of his injury, he was earning from three dollars and fifty cents to three dollars and eighty-five cents per day.

The jury returned a verdict for plaintiff in the sum of \$1000. From the judgment of the court on the verdict, defendant appealed.

The plaintiff has moved to strike defendant's bill of exceptions from the record, because it was not allowed, signed and filed in the time fixed by the court.

At the January term of the court for 1911, and on the 28th day of March, appeal was allowed and defendant given until the 9th day of the following September to file its bill of exceptions. For good cause shown, defendant was allowed other extensions of time to file its bill of exceptions, the last extension being until the 15th day of January, 1912. The bill was signed, sealed, filed and made a part of the record on the 24th day of February, 1912, more than one month after the time allowed for that purpose.

The decision of the question involves the construction of section 2029, pages 139, 140 of the Session Laws of Missouri, 1911, which reads as follows: "That section 2029 of article 15 of chapter 21 of the Revised Statutes of the State of Missouri of 1909 be and the same is hereby repealed, and the following new section

enacted in lieu thereof, to be known as section 2029: Section 2029. Such exceptions may be written and filed at the time or during the term of the court at which it is taken, or within such time thereafter as the court may by an order entered of record allow, which may be extended by the court or judge in vacation for good cause shown, or within the time the parties to the suit in which such bill of exceptions is proposed to be filed, or their attorneys may thereafter in writing agree upon, which said agreement shall be filed by the clerk in said suit and copied into the transcript of record when sent to the Supreme Court or Court of Appeals: Provided, in all cases now and hereafter pending on appeal in the Supreme Court and in any of the courts of appeals, the bills of exceptions therein may be allowed by the trial court, or the judge thereof in vacation, and filed in such court, or with the clerk thereof in vacation, at any time before the appellant shall be required by the rules of such appellate courts respectively to serve his abstract of the record, and for the purpose of determining whether such bill of exceptions shall have been filed within such time such appellate court shall make reference to its docket: Provided, that if for any reason the bill of exceptions cannot be allowed and filed within the time above provided, then the judge before whom such case was tried shall certify in writing such fact to the appellate court in which the appeal is pending, and such appellate court shall reset or continue such case for a sufficient time within which to enable such bill of exceptions to be allowed and filed, and in that event the time within which such bill of exceptions may be allowed and filed shall be determined by the time within which appellant's abstract must be served after such resetting or continuance. Hereafter, no case now, or hereafter pending in any appellate court, shall be affirmed for failure to file a bill of exceptions within the time allowed by the trial court, but such case may be affirmed

for failure to file a bill of exceptions within the time in this section provided, if error do not appear in the record of the case. All exceptions taken during the trial of a cause or issue before the same jury shall be embraced in the same bill of exceptions."

The act purported to repeal section 2029 as it stood at that time, but it was more in the nature of an amendment, as the old section was copied in the new, and the two provisos added.

The purpose of the Legislature was to allow bills of exceptions to be filed when, for any cause, the appealing party had not complied with the provisions of the section as it stood before the amendment, and as incorporated therein. The first proviso authorizes the trial court, or the judge in vacation, to allow the bill of exceptions at any time before the appellant is required by the rules of the appellate court to serve his abstract of record on the respondent.

The second proviso is to save to the appellant the right to his bill of exceptions if for *any reason* it cannot be allowed and filed within the time *above provided*. It will be noticed that under the first proviso the right of the appellant to his bill of exceptions is an unqualified right. He does not have to assign any reason why he should have his bill. He has only to present it and have it allowed if he makes application to the court, or the judge in vacation, at any time before he is required to serve the respondent with his abstract of the record.

The appellant's right to a bill of exceptions in the second proviso is not an unqualified right. He must assign some reason therefor. In this case the bill of exceptions was allowed, signed and filed twenty days before the appellant was required to serve respondent with a copy of his abstract, all strictly within the time provided in said first proviso.

But respondent contends that the purpose of the proviso was to limit the power of the trial court so

that it shall not extend the time beyond the time when the abstract should be come due; that any other construction would nullify the first part of the section. If respondent's contention be true, the proviso would mean nothing. It would be a mere nullity.

It is not our purpose to criticise the law as amended, for the purpose of its enactment is commendable, and it should be liberally construed. There is not inconsistency in any of its provisions, although there may appear to be such owing to its construction.

The first part, requiring that the bill of exceptions shall be made and filed during the term at which the trial of the case is had, or at some future time as agreed by the parties or designated by the court, is in no way inconsistent with the proviso that it may be made and filed twenty days before the appellant is required to serve his abstract. The section, as it stands, merely gives the appellant three opportunities for obtaining his bill, where formerly he had only one. For the reasons given the motion is overruled.

The theory on which the case was tried is found in instruction No. 3 given on the part of the plaintiff, and instruction No. 5 given on behalf of defendant.

Instruction No. 3 reads as follows: "The court instructs the jury that if you shall find and believe from the evidence that on the 9th day of September, 1908, plaintiff was in the employ of the defendant in its switch yards in Kansas City, Missouri, in the capacity of a switchman, and under the orders of its foreman, John Rhodes; that while he was so employed and in the discharge of his employment as such switchman at a point near the north end of said switch yards, the defendant was working another switching crew at the south end of said yards engaged in switching cars on the same track upon which plaintiff and his crew at the north end of said yards was similarly engaged; that the switching crew at the south end of said yards

knew or had reasonable cause to know that the crew in which plaintiff was engaged was using the track in controversy, or if they knew or had reasonable cause to know that the crew in which plaintiff was engaged, would in all reasonable probability in the discharge of their regular and customary employment, be using the track in question at the same time that they were using the same, then it became and was the duty of the crew engaged at the south end of said yards to use ordinary care, while switching said cars, to avoid colliding with cars upon which plaintiff was so engaged; and if you shall further find and believe from the evidence that while plaintiff was riding one of defendant's cars in a southerly direction from the north end of said yards in obedience to directions of his foreman, or in the regular discharge of his employment, on and over track No. 8 in said yards, and that while so engaged and under all the circumstances herein defined, the crew at the south end of said yards negligently and carelessly failed to exercise such care as reasonably prudent persons would exercise under like or similar circumstances to avoid colliding with cars so being switched by the crew at the north end of said yards, and as a direct result thereof the cars, so being switched in a northerly direction by the south crew, were caused to collide with car on which plaintiff was riding and as a direct result thereof plaintiff was injured, then your verdict must be for the plaintiff.

"Provided you further find from the evidence that plaintiff was, at said time and place, in the exercise of such care for his own safety as a reasonably prudent person would exercise under the same or similar circumstances."

Instruction No. 5 reads as follows: "The court instructs the jury that the defendant was under no obligation to warn plaintiff of the movement of the cars on track 8 from the opposite end from where plaintiff was working, in the direction of plaintiff, by the crew

working at the opposite end of the yards from where plaintiff was working, but that it was plaintiff's duty to keep a lookout for cars being moved on said track 8, and to use ordinary care to prevent the car upon which he was riding from coming in collision with said cars.

"And the court further instructs the jury that if they believe from the evidence that plaintiff saw, or by the exercise of ordinary care could have seen the cars moving toward him on track 8, in time to have stopped the car on which he was riding, in time to have prevented it from colliding with the other cars, then the plaintiff cannot recover and your verdict must be for the defendant."

The defendant also offered a demurrer to plaintiff's case. The defendant assigns as error, the action of the court in refusing its demurrer to plaintiff's case, the giving of said instruction No. 3, and the instruction to the jury on plaintiff's measure of damages.

In the first place, it is argued that, under the evidence, the plaintiff's injury was the result of the risk of his employment. In other words, that he was injured in the collision by the acts of his fellow-servants while engaged in their work, carried on in the usual and customary manner.

It is a general rule that the master, in conducting his business in the usual and customary manner, is not chargeable with negligence. [Cunningham v. Journal Company, 95 Mo. App. 47; Chrismer v. Bell Telephone Co., 194 Mo. 189; Brands v. St. Louis Car Co., 213 Mo. 698, and other cases.]

The evidence, we think, was conclusive that the usual custom is, that when two crews are switching at different ends in the same yards, it is the duty of each switchman employed in the work to look out for his own safety, and no duty rests upon either crew to warn the other of its movements. That is as far as the custom prevailed. The law contemplates that whatever

the custom may be, it does not exclude reasonable care. While one of the switching crews was not bound to notify the other of its intended movements, yet it was bound to exercise reasonable care with reference to the safety of the other. One crew, under the circumstances, could not act without regard to the movements of the other and justify its course under the general custom. Notwithstanding the crew at the south end may have had the right to use track No. 8 at the same time it was being used by plaintiff's crew, the former was in duty bound, in so doing, to use every reasonable precaution to avoid collision with the latter.

Custom prevails upon the theory that experience has demonstrated that it is reasonably safe. But, if the act is done in a negligent manner, it cannot be justified on the ground that it is the custom.

The evidence tended to show that the crew at the south end switched cars onto track No. 8 in reckless disregard of the safety of the other crew, when it knew or could have known that the other crew was also at the same time switching cars onto said track. The force of the collision was so great that plaintiff was thrown from his position, notwithstanding he saw the danger and did his best to save himself from falling.

There was a conflict in the evidence as to whether the one crew had the right, under the custom, to switch cars on the same track when another crew at the other end was switching, and the court would have been justified in submitting the case to the jury on the weight of evidence as to whether or not it was negligence on the part of the crew at the south end in switching as they did onto said track while the north crew was also so engaged. But the court was fully justified in submitting the case to the jury as it did in said instruction No. 3, upon the question, whether or not the switching that caused plaintiff's injury was done in a negligent manner.

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There is no inconsistency between plaintiff's and defendant's instruction; and plaintiff's instruction on his measure of damages is not subject to the objection made by defendant. The case was well tried, and the judgment is not excessive and is for the right party. Affirmed. All concur.

W. F. COEN et al., Respondents, v. LEVI BETTMAN
et al., Appellants.

Kansas City Court of Appeals. November 11, 1912.

1. **MECHANIC'S LIENS: Pleading: Evidence.** Where a petition charges that material was furnished at the joint request of a realty company and three individuals, it is not permissible to prove that one of the individuals, who acted for the realty company, was an undisclosed agent of said company.
2. ———: ———: ———. Where a petition in an action to enforce a mechanic's lien, charges a joint contract, recovery must be upon that theory or not at all, notwithstanding the evidence may disclose a right to recover upon some other cause of action not pleaded.
3. ———: **Pleading: Joint Contract.** The allegations of a petition that materials were furnished at the instance and request of a company and three individuals does not necessarily amount to an allegation of a joint contract, but is subject to the construction that the acts charged were separate and not joint.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield*, Judge.

REVERSED AND REMANDED.

New & Krauthoff for appellants.

E. D. Ellison and *Ben E. Todd* for respondents.

BROADDUS, P. J.—This is a suit to recover the value of certain materials used in the construction of a building. The plaintiffs were engaged in business as partners under the name of Coen Building Material Company. The defendant, Roby Realty Company, was doing business as a corporation. The defendants, Levi Bettman, Moses Nusbaum and Charles N. Boley, are sued as individuals, and the defendants Alfred Cossett and Edwin A. Krauthoff, as trustees, but as the judgment in no way affects the rights of the latter, it is not necessary to state why they were joined as parties to the litigation.

The Roby Realty Company was and is the lessor of two lots in Swope's Addition to Kansas City, Missouri. It is alleged in plaintiffs' petition that the said company by the terms of the lease had agreed to erect a building on said property, and that it had erected said building under a contract with the defendants Levi Bettman, Moses Nusbaum and Charles N. Boley, doing business as Boley Clothing Company; that plaintiffs, at the special instance and request of the Roby Realty Company and defendants Bettman, Nusbaum and Boley, furnished and provided for said building certain lime, sand, plaster and materials, which were used in the construction of said building by the said Roby Realty Company, and said Bettman, Nusbaum and Boley.

The amount, value and dates when said materials were used are set forth in an itemized account, which was duly filed as a lien against the said realty. No question is raised on the appeal as to the correctness of the account, for which reason it is omitted from the abstract.

The prayer of plaintiffs is for a judgment enforcing the lien against the property and for a judgment for the amount of the account against the Roby Realty Company, Bettman, Nusbaum and Boley.

It was shown that the Roby Realty Company leased the property for a term of years ending in 1931 to Bettman, Nusbaum and Boley as individuals, although they were doing a clothing business under the name of the "Boley Clothing Company." By the terms of this contract the Roby Realty Company was to erect the building in question.

The evidence shows that Boley had general oversight and charge of the work as the agent of the Roby Realty Company. The plaintiffs introduced evidence tending to show that if he was such, it was undisclosed as to them. We gather from the statements of the parties that the materials were sold upon the credit of the Boley Clothing Company and so charged upon plaintiffs' books.

The evidence tends to show that the reason the material was not paid for, was that there arose a controversy between the realty company and the clothing company as to the cost of the building, and a dispute as to the liability of the realty company for a part of such costs. Plaintiffs claimed they were informed by Boley, after the material was furnished and used in the building, that he was acting for the realty company, and for that reason they sought to make it liable for such material.

The plaintiffs dismissed as to the realty company and all the other defendants, except the three appealing defendants, who composed the clothing company.

Under the instructions of the court, the finding of the jury was for the plaintiffs. From the judgment, defendants Boley, Bettman and Nusbaum, appealed.

The contention of the appellants is that under the evidence the plaintiffs were not entitled to recover. It is insisted that as plaintiffs charged in their petition that the material was furnished at the special instance and request of the Roby Realty Company, it was error to permit them to prove that Boley, who bought the

material, was an undisclosed agent of said company, and thereby establish their claim against Boley, Nusbaum and Bettman, members composing the clothing company, because Boley did not disclose his agency.

As the petition charges that the material was furnished at the joint request of the realty company and the appealing defendants, it seems to us they were concluded thereby, and that it was not permissible for them to prove that Boley, who acted for the realty company, was an undisclosed agent. Such evidence was repugnant to their pleading. It is a familiar rule of practice that the pleader is not permitted to disprove the allegations of his pleading.

The appellants contend that such evidence was not admissible for the further reason that the allegations of the petition amount to a charge that the materials were furnished under a joint contract with the realty company and the appealing defendants. If the contract was not such, the plaintiffs could not recover, for the evidence shows that there was no such contract. Where a petition charges a joint contract, the plaintiff must recover on that theory or not at all, notwithstanding the evidence may disclose a right "to recover upon some other cause of action not pleaded." [Bagnell Timber Co. v. Railroad, 180 Mo. l. c. 463, and cases cited.] But we are of the opinion that the allegation of the petition, that the materials were furnished at the instance and request of the defendant realty company and the appellants, does not necessarily amount to an allegation of a joint contract. It is subject to construction that the acts of the defendants may have been separate and not joint.

But, under the evidence, plaintiffs were not entitled to recover against the defendants Bettman and Nusbaum, merely because they were members of the clothing company. The mere fact that Boley was the undisclosed agent of the realty company, to whom the materials were furnished, would not make the other

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two members of the clothing company liable for his acts as agent of the realty company. As individuals they were the lessees of the land on which the building was erected. The fact that they were members of the clothing company would not make them liable for the acts of Boley as agent of the realty company, although the building for which the materials were furnished, was erected for the use of such clothing company. In the absence of proof to the contrary, Boley would have no authority to bind either the clothing company, as such, or its members individually.

As the evidence was clear that Boley acted as agent for the realty company when he obtained the material from plaintiffs, we cannot see upon what theory plaintiffs sought to recover against Boley and the other appealing defendants, as his agency was discovered before the filing of the suit, as the petition itself discloses. As the agency was proved and the correctness of the account admitted, the proper course would have been to take judgment against the realty company.

For the errors noted the cause is reversed and remanded. All concur.

W. R. HADEN, Respondent, v. FRANK McCOLLY,
Appellant.

Kansas City Court of Appeals. November 11, 1912.

1. **NEGLIGENCE: Instructions: Roads and Highways.** In an action for damages caused by a collision on a public highway between an automobile and a vehicle drawn by horses, an instruction which told the jury that, "the law imposes no duty on the owners of vehicles on streets or highways to turn from the center of same, unless it became necessary to allow vehicles moving in the opposite direction to pass them," is erroneous because it is contrary to the provisions of section 10540, R. S. 1909.

2. ———: ———: ———. The statute requires persons driving on public highways to turn to the right on meeting another vehicle going in an opposite direction, and they are not permitted to continue in the center of the highway because in their judgment there is sufficient room for the others to pass without collision, the only exception being in favor of heavily laden wagons.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris*, Judge.

REVERSED AND REMANDED.

Harris & Finley and *D. C. Carter* for appellant.

Arthur Bruton, *E. A. Grimes* and *J. L. Stephens* for respondent.

BROADDUS, P. J.—This is an action to recover damages on account of the alleged negligence of the defendant.

It appears from the evidence that on the 31st day of August, 1911, that the Centralia Fair Association was holding a fair at Centralia, Missouri; that the plaintiff was engaged in conveying passengers to and from the grounds of said association, where said fair was being held, in a carriage drawn by two horses; and that the defendant was engaged in the same business, using for the purpose an automobile. While coming from opposite directions, the two vehicles came in collision, which resulted in the crippling of one of plaintiff's horses so severely that it had to be killed, and almost demolishing the harness it had on.

At the point where the collision occurred the street was fifty feet wide and almost level, with the exception of a slight elevation in the center and with two beaten tracks on either side of the center, eight feet apart. The street ran north and south, and the plaintiff's vehicle was going north in or near the center of the street. The plaintiff's evidence tends to show that if

defendant's vehicle had continued straight in the direction in which it was going there would have been no collision; that just before the collision another automobile was going north along side of plaintiff's vehicle; that a buggy drawn by a single horse was on the left and slightly in advance, also going north; and that another buggy passing, being unable to turn in any other direction in order to get out of the way of defendant's vehicle because of plaintiff's vehicle and the other automobile being in its way, the driver turned out of the street into a yard on the west side of the street; that just at this time defendant suddenly turned his automobile to the left toward the center of the street and struck one of plaintiff's horses in the side about a foot from the flank. At the time there was considerable dust in the street. There was evidence to the effect that after the collision, the automobile was found standing at an angle across the street with the front wheels in the center and with the rear ones toward the west. The carriage was standing slightly to the east of the center of the street.

The defendant had no signal attached to his vehicle, but had a mouth whistle. None of plaintiff's witnesses heard defendant give any kind of signal. The plaintiff's driver testified that he saw defendant's automobile coming about a block away.

One witness testified that the market value of the horse was \$200. Plaintiff himself testified as to its good qualities as a livery horse, and that he would pay \$200 for one equally as good to supply its place. The value of the harness was also shown.

The defendant's evidence tends to show that during several days prior to the date of the accident while the fair was in progress, the parties, in making their trips to and from the fair grounds, confined themselves to a beaten track on each side of the center elevation in the road, but on the occasion in question plaintiff was using the center, or nearly so, while defendant

was using the beaten track to the right of it; that plaintiff's team was going in a trot, and the automobile at a speed of from four to ten miles an hour; that at the time the parties were enveloped in a considerable cloud of dust, which obstructed the view, and, on account of which, he did not see plaintiff's vehicle until his machine struck one of his horses.

At the close of the evidence defendant offered a demurrer to plaintiff's case, which the court overruled.

The cause was instituted before a justice of the peace and appealed to the circuit court. The defendant filed no statement of his defense.

The theory upon which the case was tried is embodied in instruction No. 1 given by the court at the instance of plaintiff. Said instruction is as follows: "The court instructs the jury, that all vehicles, while in use, on streets and highways, have a right to use the center of such streets and highways, and the law imposes no duty on the owner or operator of vehicles on streets or highways to turn from the center of same, unless it becomes necessary to allow vehicles moving in the opposite direction to pass them, in which case the law requires such vehicles to turn to the right of the center of the street or highway; and if you find and believe from the evidence in this case, that the team and vehicle of plaintiff was, at the time of the injury, driving upon or along the center of the street or highway and that the automobile of the defendant was traveling a course on said street or highway as it approached plaintiff's team, which would allow it to pass said team without injury to either; then the driver of said team was not required to turn from the center of said street, but on the contrary had a right to proceed along the center of said street or highway; and if you further find and believe from the evidence that defendant, when about to pass plaintiff's team and vehicle, suddenly turned his automobile to the left and toward plaintiff's team and surrey, and toward the

center of said street or highway; and further find that said turning of said automobile was the direct cause of the injury complained of; then your verdict should be for the plaintiff for such damage as you may find from the evidence he has sustained by reason of the injury, not exceeding two hundred and twenty-five dollars."

The verdict and judgment were for plaintiff in the sum of \$195, from which defendant appealed.

The principal contention of defendant is that under the evidence and the law, the plaintiff was not entitled to recover, and this contention is based upon several grounds. First, that plaintiff's vehicle was wrongfully and illegally being drawn along or near the center of the street.

Section 10540, R. S. 1909, governs the question. It reads as follows: "Whenever any persons traveling with any carriage, wagon or other vehicle shall meet on any turnpike road or public highway in this state, the persons so meeting shall seasonably turn their carriage, wagon or other vehicle to the right of the center of the road, so as to permit each carriage, wagon or other vehicle to pass without interfering or interrupting, under penalty of five dollars for every neglect or offense, to be recovered by the party injured. Nothing in this section shall be so construed as to prevent a heavily laden wagon, when it meets an empty wagon or vehicle, from retaining the center of the right of way or track."

The statute requires such person so using the highway to turn to the right on meeting another vehicle going in an opposite direction. He is not permitted to pursue his course because in his judgment there is sufficient room for the other to pass without coming in conflict with his own vehicle. The object of the statute is to prevent errors of judgment in that respect and a monopoly of the center of the highway by persons disposed to use it for their own advantage

and to the disadvantage of others. That people of the latter class do so use public highways is common knowledge. The exception, that heavily laden wagons may occupy the center of the highway without turning out when meeting other vehicles, we think, emphasizes the construction we have placed upon it. It is true there is no penalty imposed for a violation of the section unless it results in injury. In *Beckeale v. Weiman*, 12 Mo. App. 354, the section of the statute as it then existed was construed, but it contains nothing contrary to our construction of the present law. And it may with propriety be here said that, if it was true that plaintiff was so situated, as he claims, that he could not turn from his course in the center of the highway because other vehicles near prevented him from so doing, negligence is not to be imputed to him for his failure to turn to the right when meeting the vehicle of the defendant. [*Beckeale v. Weiman*, *supra*.]

If, as contended, the collision occurred solely by reason of the defendant turning his vehicle suddenly into the center of the road, then it is no defense to the defendant to say that plaintiff has no cause of action for the injury because he was occupying the center of the road. The wrongful act of the plaintiff in that respect would not excuse the wrongful act of the defendant in failing to exercise proper care to avoid the collision. One wrong does not justify another wrong. The law is repugnant to the doctrine of retaliation.

The objection that the value of the horse was not shown by competent evidence is not well taken.

The plaintiff's instruction on the measure of damages told the jury that they might award plaintiff "such damage as they might find from the evidence he has sustained by reason of the injury." The instruction is criticized on the ground that as the evidence showed that the horse had a particular value

as a livery animal, the instruction should have been directed to its value as such. In support of this idea, we are cited to Pannell v. Allen, 160 Mo. App. 714, which has no application. If error, it could not have been prejudicial to the defendant for it is more than probable that if the jury had been called upon to put a value on the horse because of his good qualities for livery purposes, the damages assessed on that account would have been greater, as the proof was that as a livery animal it was worth \$200, whereas the verdict for damages to the horse and harness combined was only for \$195.

And evidence that a horse is a good livery animal is not evidence of special value any more than to say, he is gentle, or possessed of any other good quality. The instruction is specific enough. If it was lacking in that respect, it was the duty of the defendant to have asked the court to make it more definite. That is now the general rule.

We think the error pointed out was misleading, and, as it put a wrong construction upon the statute on a subject of much importance, the cause is reversed and remanded. All concur.

STATE OF MISSOURI, Appellant, v. H. C.
EUBANKS, Respondent.

Kansas City Court of Appeals. November 11, 1912.

LOCAL OPTION: County Courts. The proceedings to procure an election to vote on the adoption of the Local Option Law were begun in the County Court of Randolph County, at Moberly by petition, and an election ordered. Afterwards, at Huntville, the county court appointed the judges to hold such election. *Held*, that under the Act of the Legislature (1885, sec. 6) providing for the holding of terms of the county court at Moberly, the Local Option Law was not legally adopted.

Appeal from Randolph Circuit Court.—*Hon. A. H. Waller, Judge.*

AFFIRMED.

F. E. Murrill for appellant.

Whitecotton & Wight for respondent.

BROADDUS, P. J.—The defendant was indicted at the October term, 1911, of the circuit court of Randolph county, charged with a violation of the Local Option Law. Defendant filed a plea in abatement to the indictment, wherein he attacked the legality of the proceedings in the adoption of the Local Option Law in the county.

Huntsville is the county seat of Randolph county. In 1885, the Legislature provided for holding four terms of the county court at Moberly, with like power and jurisdiction coextensive with said county, as pertains to similar courts of record in the state; and establishing a county clerk's office at Moberly, with a deputy clerk to be in charge of such office.

Section 6 reads as follows: "All the books, papers and records pertaining to matters and causes of action pending in said county court, and all business transacted in said county court at the city of Moberly shall be kept at the county clerk's office herein provided for, at the city of Moberly; and all business begun in said county court, at Moberly shall be proceeded with to final determination therein, unless removed out of said court according to law; but the parties to any matter or cause of action pending in said county court, at Moberly, may, by agreement in writing, signed by the parties or their attorneys, and filed in said court, remove the same into the county court at Huntsville in said county, and parties to any matter or cause of action pending in the county court at the

city of Huntsville, in said county, may, in like manner, remove the same into the county court at Moberly in said county, and said matter or cause of action, when so removed, shall be proceeded in as if it had originated in said court into which it is so removed; and in every such case the clerk of the county court may transfer the original papers on file in said matter or cause, with a certified copy of the record of entries in the same, into said court into which said matter or cause of action has been so removed, and the record in said cause shall show such removal and transfer."

Upon the hearing of the special plea in abatement, it was shown that the proceedings to procure an election to vote on the adoption of the Local Option Law, were begun in the county court, held at Moberly, at its May term, 1898, by a petition filed in said court, and an election ordered to be held in the county on the 20th day of June, 1898. At the May term of the county court, held at Huntsville on the 25th of May, 1898, the county court appointed judges to hold said election "to determine whether alcoholic liquors shall be sold therein," etc. Proof of publication of the notice of said election was made to the court, and the said court and clerk thereof cast up the result of said election, and declared the Local Option Law in force in the county outside of the limits of the cities of Huntsville and Moberly. It was not shown that the proceedings, after they had been instituted in the Moberly court, had been by order, transferred to the court at Huntsville.

The court sustained the plea in abatement and discharged defendant, and the state appealed.

While the act of the Legislature provided for four terms of the county court to be held at Moberly, having concurrent jurisdiction with the county court established at Huntsville, the county seat, in all matters pertaining to the jurisdiction of county courts, it made two separate courts, so that proceedings instituted in one court gave that court jurisdiction to the exclusion

of the other. In short, there were two separate county courts established in Randolph county, having concurrent jurisdiction. That is to say, the judges of the county court were required, in addition to holding court at Huntsville, to hold four terms at Moberly. Whereas, the two courts, having concurrent jurisdiction over certain matters, were nevertheless separate and distinct courts, located at different places, with distinct offices for the keeping of records.

Section 6 of the act establishing the courts provides that all business begun in either of said courts shall be proceeded with to a final determination, unless removed out of said court "*according to law.*" What was meant by removal *according to law*? The act nowhere explains, and we know of no general law providing for the removal of business from one county court to another in the same county.

But the act is specific enough in one respect, as it provides for the removal of business by the written agreement of parties to any matter or cause. When the subject-matter is purely county business, there does not seem to be any good reason why it could not be transacted as well in one court as in another, and there would be no necessity for a change of courts to the proceedings. But, we can see that, as to parties having business in the county courts, one court would be preferable to the other on account of its proximity or some other convenience to them, for which reason a change would be desirable. Had there been two parties to the local option proceedings, they could have only been removed from Moberly to Huntsville by written agreement. If there were no two parties to the local option proceedings, then there is no law by which the change of jurisdiction of the matter could have been effected. So far as the record goes, the papers were merely taken from Moberly to Huntsville, where the business was concluded. If business, begun in one court, could be transferred merely by hand to

the other, and back and forth in that manner, and record entries made in whatever court the papers might be for the time being, the purpose of the law itself, in providing for the two courts, would be defeated, viz: that of convenience to the people residing in different parts of the county and most near to the place of holding one or the other of the two courts. Besides, the people have the right to know when and where the public business is to be transacted, and they could not know that such business, begun today at Moberly, would be resumed tomorrow at Huntsville if the change be made by hand, and not by entry of record.

Nothing has been suggested why the judgment of the trial court is not the only judgment possible under the facts. Affirmed. All concur

JAMES VANNEMAN, by **EVA VANNEMAN**, next friend, Respondent, v. **WALKER LAUNDRY COMPANY**, Appellant.

Kansas City Court of Appeals. November 11, 1912.

1. **NEGLIGENCE: Collision in Street.** The plaintiff, a minor, was riding a bicycle west on the north side of a public street and close to the outside rail of the street car track, when the driver of the defendant's laundry wagon, which was standing near the curb on the same side of the street and facing the same way as the plaintiff, suddenly, without looking around, pulled the horse around into the plaintiff's course, thus causing the plaintiff to collide with the legs of the defendant's horse, whereby the plaintiff fell and was injured. *Held*, that driver of the wagon was guilty of culpable negligence.
2. ———: **Duty of Drivers of Vehicles.** It was negligent for the driver of wagon in a crowded street not to keep a proper lookout so as to prevent collisions.
3. ———: **Ordinary Care.** Everyone while traveling on a street, is required to exercise ordinary care so that he may not interfere with its reasonable use by other travelers.

4. **ADMISSIONS: Agency: Evidence.** The admission that the driver was in charge of and was driving the defendant's wagon is prima facie evidence that he was engaged in the defendant's business.
5. **INSTRUCTIONS: Technical Objections.** The objection to an instruction that it required the defendant to maintain a lookout for the plaintiff instead of requiring the exercise of ordinary care, is purely technical.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas*, Judge.

AFFIRMED.

Battle McCardle for appellant.

(1) Contributory negligence on part of plaintiff will bar his recovery. *Zurfluh v. Railroad*, 46 Mo. App. 636; *Judd v. Railroad*, 23 Mo. App. 56; *Rigby v. Railroad*, 153 Mo. App. 330; *Veatch v. Railroad*, 145 Mo. App. 232. (2) Plaintiff offered no evidence of negligence on part of defendant. Jury was not justified in assuming negligence. *Warner v. Railroad*, 178 Mo. 125; *Garann v. Mfg. Co.*, 186 Mo. 300; *Byerley v. Light Co.*, 130 Mo. App. 593. (3) There was no evidence that alleged acts of driver were within the scope of his employment, or while engaged in the line of his duty. *Fleishman v. Ice Co.*, 148 Mo. App. 117; *Daily v. Maxwell*, 152 Mo. App. 415; *Evans v. Auto Co.*, 121 Mo. App. 266.

Henry J. Latshaw for respondent.

(1) Defendant's demurrer, offered at the close of plaintiff's case and also at the close of all testimony, was properly overruled. *Fleishman v. Ice and Fuel Co.*, 148 Mo. App. 117; also same case on retrial, 143 S. W. 881; *Dailey v. Maxwell*, 152 Mo. App. 424. (2) The defendant owed the plaintiff the duty of reasonable care to be on the look out for him before swinging its horse around across the street, and the viola-

tion of that duty was negligence. (3) There was no evidence of contributory negligence on the part of the plaintiff, and even if there was any such evidence, the jury passed upon that question, under proper instructions asked by appellant. (4) Plaintiff's instruction "A," given by the court, was a correct declaration of law applicable to this case. *Fleishman v. Ice and Fuel Co.*, 148 Mo. App. 117. (5) There was sufficient evidence that the laundry driver was, at the time he injured the plaintiff, acting in the scope of his employment, and the question was one for the jury. *Fleishman v. Ice and Fuel Co.*, 148 Mo. App. 117.

BROADDUS, P. J.—The plaintiff, a boy of about thirteen years of age, sues to recover damages for injuries he received as the result of the alleged negligence of a servant in defendant's employ. The defendant is engaged in the laundry business, in which it is necessary to use wagons for the purpose of receiving and carrying material to be laundered to its place of business, and afterwards returning it to the owners.

The evidence of the plaintiff is to the effect, that he was passing along on Fifteenth street riding a bicycle, and, while going at a moderate speed, was injured by coming in contact with the legs of a horse attached to one of defendant's laundry wagons; that he was going west just north of the north rail of the street car company; that he first saw the defendant's wagon as he passed Holmes street, the horse facing west in front of a store and on the west of it was an automobile, and east of it was a big covered express wagon, all standing still at the curbing; the express wagon was almost against the laundry wagon, which was standing just in front of the store; that there was no one in the automobile, nor in the express wagon; that he had sufficient room to pass; that when he got where his wheel was even with the back wheel of the laundry wagon, the driver, without looking around,

suddenly pulled the horse around and he came in contact with the horse's legs before he had time to pull away, but that he tried his best to do so, but failed; that in the effort to get away he got upon the car tracks about the center; that the horse got scared and started to run, and he believed it stepped on his ankle; that the driver gave no indication that he was going to turn his horse suddenly, and that he did not think that he was going to make the turn. The plaintiff received severe injury to his ankle, and his back was sprained, on account of which, he suffered pain and was confined to his home and away from school for about two months; that his back was still hurting him at the trial.

The evidence of Stitt, the driver of defendant's wagon, contradicts the statement of plaintiff in most important particulars. He further testified, that he drove up to the place in question to visit his roommate, who was sick, and that he came down and got into the wagon and started on his route towards Holmes street.

The allegations of the petition are to the effect, that the defendant's driver was negligent in starting the horse and turning it into the street in front of plaintiff's at a time when the latter was so near to the horse that it was impossible for him to stop his bicycle or turn aside to avoid the collision; that the driver was negligent in so starting the horse without looking to see whether plaintiff or anyone else was approaching; that the driver was negligent in neglecting to exercise ordinary care to look for approaching vehicles, pedestrians and other travelers before so turning his horse and wagon; that he was negligent in failing to warn plaintiff that he intended to start his horse and wagon; that the driver knew, or by the exercise of ordinary care could have known, of the perilous position of the plaintiff; that the driver by the exercise of ordinary care could have seen that

plaintiff was in a perilous position where in the natural course of events he would collide with said horse and wagon; and that on account of and as a direct result of the said negligent acts of said driver and of each of them, said bicycle and horse and wagon were allowed and caused and permitted to run into collision with and collide against each other.

The answer consists of a general denial, and that plaintiff's injuries, if any, were the direct and sole result of his own negligence; and further, that the acts of negligence charged were not done by any one in the service of defendant, or in furtherance of any duty owed by such to defendant and defendant is not liable for the consequences thereof.

The defendant tendered a demurrer to plaintiff's case, which the court overruled. Among other instructions, the court gave the following to the jury: "The court instructs the jury that if you find and believe from the evidence in this case that on February 28, 1910, plaintiff was riding a bicycle west on the north side of Fifteenth street, and that said Fifteenth street was a public street and thoroughfare in Kansas City, Missouri, at said date, and that as plaintiff got within a few feet of the wagon in evidence the driver of said wagon carelessly and negligently turned said wagon out into the street, and to the south or southwest without looking to see if plaintiff was coming, providing you further find and believe from the evidence that a failure of the driver, to so look was negligence under all the facts and circumstances in evidence, if any, and at a time when plaintiff could not by the exercise of ordinary care avoid a collision with said horse and wagon and that a collision between said horse and wagon and said bicycle did then and there take place, and that plaintiff was thereby injured, and that said horse and wagon belonged to defendant and that the driver thereof was in the em-

ploy of defendant and was then and there in the discharge of his duties as an employee of defendant, and if you further find and believe from the evidence that plaintiff is a minor of about fourteen years of age and that Eva A. Vanneman is legally appointed and acting as his next friend for the prosecution of this suit; and if you further find and believe from the evidence that at all the times herein mentioned and especially as plaintiff approached said horse and wagon and at the time of said collision plaintiff was himself in the exercise of ordinary care and caution in his part, then your verdict should be for plaintiff and against defendant."

The jury returned a verdict in the sum of \$500 in plaintiff's favor. Defendant appealed from the judgment.

The defendant makes the following assignment of error: First, that of contributory negligence on the part of the plaintiff. Second, that there was no proof of negligence on defendant's part. Third, that there was no evidence that the alleged acts of the driver were within the scope of his employment, or while engaged in the line of his duty. Fourth, that plaintiff's instruction changed the issues made by the pleadings, in that, it required defendant to maintain an outlook for plaintiff alone, instead of requiring the exercise of ordinary care; in that, it made defendant liable for the mere striking of plaintiff by the horse, and ignored the issue, made by the pleadings and proof, as to whether defendant saw or could have seen plaintiff in time to have avoided the accident.

It is contended that plaintiff was negligent in failing to exercise ordinary care. The evidence tended to show that he was passing along the street on his bicycle where he had the right to go; that the automobile, the express wagon and laundry wagon were standing; and that the driver got into the wagon and suddenly turned the horse around towards plaintiff at a

time when he could not, by his utmost effort, prevent colliding with the horse and wagon. The plaintiff's evidence shows that he was taken by surprise at the sudden and unexpected conduct of the driver in turning his horse away from the curb and out into the street directly in plaintiff's course.

Assuming that the statements of plaintiff are true—we are of the opinion that the driver of the wagon was guilty of culpable negligence. The streets and highways are for the use of the traveling public. Everyone, while traveling on a street, is required to exercise ordinary care so that he may not interfere with its reasonable use by other travelers. In populous cities like Kansas City where people are passing upon the streets in all kinds of vehicles, on foot and on horseback, a person is required to be on the lookout to prevent collisions. He cannot shut his eyes or fail to exercise his senses so as not to see what is going on and justify his conduct, in the event he caused any injury to some one else, on the ground that he did not see the danger until too late to avoid injuring him. If by his failure to exercise proper care for the safety of others he has placed a person in peril, he will not be justified because he did not see him in time to avoid injuring him. If by the exercise of reasonable care he could have avoided the peril, he is negligent. And such is the theory upon which plaintiff's cause of action is founded. [Fleishman v. Ice & Fuel Co., 148 Mo. App. 117.] It seems to us that the proposition is too plain to require elaboration or citation of precedents.

We think it was sufficiently shown that the driver of the wagon at the time was engaged in his master's service. It is admitted that he had charge of and was driving the defendant's laundry wagon. It has been held that similar proof constituted *prima facie* evidence that he was engaged in the master's business. [Fleishman v. Ice & Fuel Co., *supra*.] The plaintiff's case, however, does not depend upon this presumption,

because the driver's testimony settles beyond dispute that he was at the time of the collision actually engaged in the furtherance of the business of his employment. Although it maybe said that while he was enroute to see his sick friend and while with him at the place on Fifteenth street he was not within the scope of his employment, yet, when he got into the wagon and started on his business route at that moment he resumed his relationship to the defendant as employee in the discharge of his duties as driver of the laundry wagon.

The objection to plaintiff's instruction, that it required defendant to maintain a lookout for plaintiff, instead of requiring the exercise of ordinary care, is purely technical. The instruction did require the exercise of ordinary care. Its particular application to plaintiff does not make it bad, for the defendant owed the duty of exercising such care to plaintiff as one of the travelling public.

The other objections to the instruction have been answered by what has been already said. The cause is affirmed. All concur.

LEONARD MONK, Appellant and Respondent, v.
WABASH RAILROAD COMPANY, Respondent
and Appellant.

Kansas City Court of Appeals. November 11, 1912.

RAILROADS: Negligence: Personal Injury: Question for Jury.

Plaintiff, a section man, was sent by his foreman down the railroad track at night to flag an approaching passenger train at a dangerous place on the track. A slow order had limited speed of trains over such track to five miles an hour. Plaintiff testified that when the train approached, he was standing in the position he had been ordered to take, and that he gave the slow signal, but receiving no response, remained on the

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track, repeating the signal, until too late to escape injury because of the speed of the train. The train approached on a straight track, at night, and plaintiff testified that it was impossible to judge its speed. There was evidence showing the train was running at a speed much greater than that limited by the slow order. *Held*, in an action for damages for such injury that there was sufficient evidence to make a question for the jury, and that a demurrer to the evidence was improperly sustained.

On Motion to Modify.

1. **ATTORNEY: Agreement: Authority.** An attorney for defendant has implied authority in the conduct of a trial for his client, to agree that at the close of the evidence he will present a demurrer thereto, which, if sustained by the court, judgment shall be rendered for defendant; but that if the demurrer is refused, the findings and judgment shall be in favor of plaintiff for \$5000, the losing party retaining a right to appeal.
2. **JUDGMENT: Verity: Judge's Docket: Clerk's Minutes.** The recorded judgment of a court of record imports absolute verity unless contradicted by other parts of the record. And such judgment may properly recite agreements of parties not contradicted by the judge's docket or the clerk's minutes, though such agreements are not mentioned in such docket or minutes.
3. **JUDGMENT: Appellate Court: Assumption: Remedy.** If a recorded judgment of the trial court recites an agreement of the parties which is made by the attorneys in the cause, an appellate court will assume that the court found the attorneys had authority to make the agreement. An appellate court cannot inquire into the authority of such attorneys. The proper remedy is by proper proceedings in the proper court against the judgment.

Case No. 10384. On Supplemental Proceedings.

1. **NUNC PRO TUNC: Judgment Entered: Presumption: Evidence.** A judgment entered in the judgment record is presumptively the judgment rendered by the court, and to correct it by proceedings *nunc pro tunc*, after the term, oral evidence is not admissible. The only competent evidence is from the judge's docket or the clerk's minutes or other record in the cause showing that a different judgment was rendered.
2. **———: ———: ———: Judge's Docket: Clerk's Minutes: Silence.** If reliance is placed on the judge's docket and clerk's minutes to correct a judgment, *nunc pro tunc*, they, to authorize the correction, must show that the judgment entered is not

the one which the court rendered. The mere silence of the docket and the minutes as to a part of the judgment entered on the record, is not sufficient to authorize that portion to be stricken from the judgment.

Appeal from Adair Circuit Court.—*Hon. Nat. M. Shelton*, Judge.

TWO CASES. No. 10384 REVERSED AND REMANDED (*with directions*). No. 10182 AFFIRMED.

J. L. Minnis and Higbee & Mills for appellant and respondent.

Campbell & Ellison and Weatherby & Frank for respondent and appellant.

ELLISON, J.—Plaintiff was an employee of the defendant railway as a section man under the immediate direction of a foreman. He was seriously injured, and, charging the injury to the negligence of defendant's servants, brought this action for damages. The trial court sustained a demurrer to the evidence and rendered judgment for the defendant, whereupon plaintiff appealed.

It appears from the record that there had been a former trial of the cause, in which plaintiff obtained a verdict for ten thousand dollars. A motion for new trial filed by defendant was sustained for the following reasons:

"First: Because the court is of the opinion that it erred in not sustaining defendant's demurrer tendered at the close of plaintiff's case.

"Second: Because the court is of the opinion the verdict is the result of perjury on the part of plaintiff in that he swore he was on his feet giving the slow signal from the time the train came in sight, when the great preponderance of the testimony introduced by plaintiff satisfies the mind of the court there was no signal given."

Plaintiff prepared his bill of exceptions, which was duly signed by the judge and filed. Afterwards it was agreed between the parties that there should be a new trial by the court without a jury and the evidence should be that taken on the former trial as preserved in the bill of exceptions. That bill of exceptions was submitted to the court by the parties and defendant offered, and the court gave, a peremptory instruction declaring "that under the pleadings and evidence the plaintiff cannot recover." Judgment was then entered for defendant and plaintiff appealed to this court.

It is a fundamental rule that in passing on a demurrer to the evidence we must assume the truth of the testimony in behalf of the defeated party and allow all reasonable inferences which may be drawn therefrom in his favor. It is from that standpoint we must consider the case. [Knorpp v. Wagner, 195 Mo. 637; Pauck v. St. Louis Beef & Prov. Co., 159 Mo. 467; Wilson v. Board, 63 Mo. 137.]

It is admitted by defendant that plaintiff was in its employment as a section man and that on the night of his injury he was sent by his foreman before nine o'clock at night, to a bad or dangerous place on the track near a bridge about 200 feet long, to signal trains, a passenger train being due at that hour. It is conceded that he took with him a lantern and a rain-coat. It is likewise conceded that he was injured by being run over by defendant's train and his arm cut off, besides other injuries of less consequence. Plaintiff charges negligence on the part of defendant's servants in charge of the train, and denies contributory negligence. Defendant's theory of the cause of his injury is that he was asleep on the track with his coat for a pillow. This theory is not said to be supported by any direct evidence, but is in the nature of a conclusion drawn by counsel as the most reasonable way

to account for the injury conceded to have been inflicted.

The bad track was at the north end of a bridge, about three-fourths of a mile north of the town of Greentop, in Schuyler county, and was caused by the embankment having slipped to such an extent as to make necessary great care and caution in trains passing over it; and that was the cause of plaintiff being sent to stand at the place and signal an on-coming train. On account of rains the condition had existed for some little time and train crews had first been ordered to slow down to ten miles an hour when passing over it, but afterwards that order was changed to five miles. Notwithstanding the order, it was deemed prudent to station a man at the place to signal night trains.

Plaintiff testified that he was directed to take his position at the north end of the bridge; that he could have signalled by standing 150 feet north of the bridge, but his orders were to take position at the end of the bridge. Asked on cross-examination if he could not have signalled from the south end of the bridge, he answered: "Yes, I could if the boss had put me there." Literal compliance with the order would put him on the track. But, aside from that, the condition there made it necessary that he place himself on the track, for the embankment had slid off on one side up to the end of the ties and the slope on the other side was such as to make it impractical to stand off of the track. He testified that when the train came around a curve, the track was straight and he gave the engineer the slow signal by slowly raising his lantern up and down. It was the duty of the engineer to answer or respond to the signal by two sharp blasts of the whistle, but he did not do so and plaintiff continued at his place signalling. He stated that at night, looking straight down the track into the headlight of an approaching engine, one can-

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not tell whether it is coming fast or slow, and that he did not know it was going at a rapid rate until it struck the south end of the bridge, when the rumble or noise, such as is made on a bridge, warned him of his danger, and he immediately attempted to get off the track, when he slipped and fell between the rails and quickly endeavored to throw himself outside by turning over the west rail, but before he was completely outside, the wheel of the engine caught his arm and cut it off. As we have said, plaintiff testified he could not tell by looking straight down the track that the train was running rapidly, but supposed it would be coming slow as the orders were to run slow, but he further stated the reason he remained on the track was that up to the time the engine came upon the south end of the bridge and made the rumbling noise, he "kept thinking that he (the engineer) would answer" the signal.

Plaintiff walked to the nearest house and was afterwards taken to a hospital. Persons who soon heard of the injury went immediately to the place. Plaintiff's overcoat was found eight or ten feet north of the bridge his cap six or eight feet north of the coat, and the lantern at the north end, while his severed hand and elbow were found about thirty-five feet north of the coat, one between the rails and the other outside.

The judgment of witnesses for plaintiff differed as to the speed of the train. Plaintiff himself stated that he thought it came upon him at fifteen or twenty miles an hour. Other witnesses put it much faster and yet the conductor of the train (introduced by plaintiff) said it was about five miles; and so the engineer and fireman stated. There was evidence that the ordinary rate of speed at that place, when the track was in condition, was fifty or sixty miles an hour, and witnesses who observed this train that night from their houses said it was running at its usual rapid rate until it got

as far as the middle of the bridge when it seemed to slacken.

We think it clear it should not have been said, as a matter of law, that no case was made for plaintiff. As already stated, we must accept the testimony in his behalf, including his own, as true. From that standpoint, he was standing in obedience to defendant's order, at the north end of the bridge where there was a dangerous place in the embankment of the track made by recent rains, with directions to notify the train by signal to slow down the speed to five miles an hour. The engineer of the train himself had this order, but it was a wise precaution to also have a flagman at the place, that no mistake could lead to serious disaster. He saw the approaching train down a straight track, near a quarter of a mile from the bridge, and began to give the proper signal by moving his lantern up and down. It was the duty of the engineer to notify him that he saw the signal by two short blasts of the whistle, and he did not do so, which neglect caused plaintiff to remain at his post continuing the signal. The question may suggest itself as to just when plaintiff, as a prudent man, should have ceased giving the signal which he knew was unanswered, and leave the track. We think he gives reasonable account of his conduct, certainly good enough to be passed upon as a question of fact. He could not tell by looking down the track into the headlight of the engine, that it was coming at a greater rate of speed than five miles an hour, the rate named in the slow order, and he could reasonably suppose it was not; at least he was entitled to have the character of his action, in all the circumstances, passed upon as a matter of fact. He was only made to realize that the train was approaching at a rapid rate, as it got upon the bridge, when he immediately endeavored, to save himself by clearing the track, when he unfortunately fell and was struck before he could roll entirely over the rail. There was evidence that the engineer

had been over the track, knew its condition and expected a flagman to be there. It was therefore great carelessness in him to run at the speed stated by plaintiff and other witnesses. There is every reasonable inference that but for such speed plaintiff could have fully cleared the track.

Turning to the action and conduct of defendant's train servants, we find (from the standpoint of the evidence for plaintiff) that instead of a speed of five miles an hour they were negligently running at a rapid rate. The engineer and fireman testified that they were carefully and steadily looking ahead and that they did not see a signal, nor did they see plaintiff. Yet they were looking so carefully that the fireman saw what he took to be a coat and a dinner pail by the side of the track. The patent and indisputable fact that plaintiff was on the track and was run upon by the train, not only neutralizes that evidence, but it establishes affirmatively that they saw him or else were not looking. (*Ellis v. Met. St. Ry. Co.*, 234 Mo. 657, 673; *Lynch v. Ry. Co.*, 208 Mo. 1, 24.) It has been several times ruled by the supreme and appellate courts that testimony of a witness, with normal eyesight, who is looking in the direction of an object in plain view, that he did not see such object, should not be accepted as the truth.

We think it apparent that there was evidence tending to prove, or from which a reasonable inference could be drawn, that defendant's servants were running the train at a rate of speed somewhere between fifteen or twenty miles per hour and fifty or sixty miles, in approaching a place where they were expected to run five miles; that they saw plaintiff and his signal and made no response; that they negligently ran upon him, inflicting the injury stated.

Defendant's entire argument against the appeal is really a concession that there was an issue made by the evidence in plaintiff's behalf. Inferences are

drawn, conclusions stated and much forcible matter suggested which may well be dwelt upon in debating the issues, but they have no effect as an argument that there *were no* issues.

According to the recitation in the record before us, the parties not only agreed that the new trial should be before the judge without a jury, but also that in case defendant's demurrer to the evidence should be overruled, that the court should then render judgment for plaintiff for five thousand dollars, that being one-half the verdict of the jury in the first trial. In view of this record plaintiff asks that the cause be remanded with directions to the circuit court to enter judgment for him for that sum.

Defendant insists that the agreement thus set out in the record of the judgment, is incorrect in so far as it authorizes a judgment for plaintiff if the defendant's demurrer should be overruled; and claims that the agreement was that if the defendant's demurrer to the evidence was overruled and the court should find for plaintiff, then the amount of the damages should be \$5000.

This phase of the case has not been briefed by counsel and we have concluded to remit the question to the trial court, so that if the defendant is found to be bound by the agreement set forth in the record, judgment may be entered in accordance therewith; and if it be found not to be a binding agreement, that the cause stand for trial.

Reversed and remanded. All concur.

ON MOTION TO MODIFY.

The only question which has given us any concern is plaintiff's motion to modify the opinion and direct a judgment to be entered in compliance with the agreement contained in the judgment of the trial court.

The judgment rendered by the trial court on the trial of this cause is as follows:—

“Now on this day this cause coming on for trial and both plaintiff and defendant appear and answer ready for trial, and jury is waived and cause submitted to the court upon the following agreement of the parties hereto, to-wit: Plaintiff shall offer and introduce in evidence all of the evidence introduced in his behalf at the former trial of this cause, and which is preserved in the bill of exceptions heretofore filed in this cause, and thereupon the defendant shall offer and introduce in evidence all the evidence introduced in its behalf at the former trial of this cause, and which is preserved in the bill of exceptions aforesaid, and thereupon the defendant shall request the court to give a declaration of law to the effect that under the pleadings and evidence the plaintiff cannot recover and the finding and judgment must be for the defendant. If the court give said declaration of law, judgment shall be rendered for the defendant. If the court refuse to give said declaration of law, the finding shall be in favor of plaintiff, and his damages assessed at the sum of \$5000, and judgment rendered in accordance therewith. The losing party shall have the right to appeal from said judgment. And thereupon the trial progressed, and the plaintiff, to sustain the issues in his behalf, introduced in evidence all of the evidence, preserved in the aforesaid bill of exceptions, which was introduced in his behalf at the former trial of this cause, and thereupon the defendant, to sustain the issues, in its behalf, introduced in evidence all of the evidence, preserved in the aforesaid bill of exceptions, which was introduced in its behalf at the former trial of this cause, and thereupon both parties rested,” and the court sustained such declaration of law.

Defendant admits an agreement was made, but denies that it contained the following clause now appearing in the judgment, viz: “If the court refuses to

give the said declaration, the finding shall be in favor of the plaintiff and judgment rendered in accordance therewith." Defendant states that the agreement was this: "It is agreed by counsel, the court should try the case on the evidence contained in the bill of exceptions, and if the finding should be for plaintiff the damages should be assessed at \$5000. But it was not agreed if a demurrer to the evidence should be overruled that judgment should go for plaintiff." It is then stated by defendant that "there is at least a misunderstanding that will be brought to the attention of the lower court at its next session by motion to correct the judgment *nunc pro tunc*. That need not, however, delay the hearing of this appeal." Since then defendant did institute a *nunc pro tunc* proceeding to correct the judgment by striking out the agreement therein. This was heard by the circuit court and the result was a refusal to correct the judgment. Defendant took what is designated, a supplementary appeal to this court and we have at this term affirmed the action of the trial court. See opinion below.

We must accept the recorded judgment as absolute verity unless other parts of the record show that cannot be done. In this connection defendant insists that other parts of the record nullify the entry of the agreement; that is, the entry of disposition of the case on the judge's docket does not authorize an entry of the agreement in the judgment. The judge's entry is: "Jury waived, tried to the court, verdict for defendant on the whole case on demurrer tendered by defendant." It is claimed, and not disputed by plaintiff, that the same entry was made by the clerk on his minutes. But these are not incompatible with the judgment actually entered. It must be presumed, unless contradicted by the record, that the judgment entered is the judgment rendered. [Railroad v. Holschlag, 144 Mo. 253; Wooldridge v. Quinn, 70 Mo. 370; Jones v. Hart, 60 Mo. 351.] It has been so decided by this court in the recent case of

Kreisel v. Snively, 135 Mo. App. 155. And by the St. Louis Court of Appeals in Freedman v. Holberg, 89 Mo. App. 340. In Jones v. Hart, *supra*, in stating that the judgment entered must be taken to be the judgment of the court, the Supreme Court said that the judgment did not need the judge's docket or the clerk's minutes as vouchers for its authenticity.

But defendant insists that conceding the agreement was made, it was entered into by its attorney without authority from it, and that the agreement was such an act as was not within the implied authority of an attorney in a cause. It has been held in this State that an attorney, by his general authority as such, may agree that the result in one cause shall abide the result in another, the plaintiff being the same. [Railroad v. Stephens, 36 Mo. 150.] That the opposite party may take judgment on a verdict then rendered against his client. [Barlow v. Steele, 65 Mo. 611.] And that he may dismiss his client's action. [Davis v. Hall, 90 Mo. 659.] And that if there is any abuse of the authority, the remedy is against him. "An agreement (by an attorney) relating to the conduct of a suit and its proceedings during the trial, in open court and entered upon the record, will conclude the parties." [McCann v. McLennan, 3 Neb. 25; Staples v. Parker, 41 Barb. 648.] In some jurisdictions it is held that he has power to confess judgment. [Thompson v. Pershing, 86 Ind. 303; Williams v. Simmons, 79 Ga. 649, 655.]

In our opinion it was within the implied authority of the attorneys to make the contract recited in the judgment. But whether that is a correct view of the law would make no difference in the result in this case. For it is well settled that having been set out in the record of the judgment as an agreement of the parties to the cause, if, in fact, made by the attorneys, for their respective principals, we must assume the court found they were authorized to do it. [Railroad v. Ketchum, 101 U. S. 289, 296; Cyphert v. McClune, 22 Pa. St. 195;

Denton v. Noyes, 6 Johns. 296; Talbot v. McGee, 20 Ky. 375, 377.] In the first of these cases the Chief Justice said that: "A solicitor may certainly consent to whatever his client authorizes and in this case it distinctly appears of record that the company assented through its solicitor. This is equivalent to a direct finding by the court as a fact that the solicitor had authority to do what he did, and binds us on an appeal so far as the question is one of fact only. The remedy for the fraud or unauthorized conduct of a solicitor, or the officers of the corporation, in such a matter, is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and the facts ascertained. We take a case on appeal as it comes to us in the record, and receive no new evidence." In the case last cited the court said: "That the attorney who made the admission was not Talbot's attorney, is a question of fact which does not arise out of the record and proceedings in the court below. This court cannot originate an inquiry whether the attorney representing Talbot in the court below, was or was not authorized to appear as his attorney." It is apparent that an appellate court cannot stop to enter upon an inquiry as to the authority to enter a judgment which is found to be regularly, and so far as appears, properly entered in the record. It is wholly impracticable, and to do so would introduce great confusion and disorder in the administration of appellate functions.

Our conclusion is to modify the foregoing opinion by withdrawing the last paragraph and substituting therefor that the trial court be directed to enter judgment for plaintiff for \$5000 in accordance with the agreement.

PROCEEDING IN CASE NO. 10182.

Plaintiff was injured by being run over by one of defendant's engines, whereby one of his arms was sev-

ered from his body. He charged defendant with negligence and brought his action against it for damages and upon trial obtained a verdict for ten thousand dollars. On motion of the defendant for a new trial, the trial court set the verdict aside for the reason, among others, because it believed that plaintiff had committed perjury. Plaintiff, preparatory to an appeal, took a bill of exceptions signed by the judge. It was then agreed by the parties that the cause should be submitted for another trial to the judge (a jury being waived) on the evidence of each party as set out in the bill of exceptions, and that defendant should present a demurrer to the whole evidence upon which, if sustained by the court, judgment should be rendered for defendant. The parties disagree as to what the judgment should be if the demurrer was overruled. Plaintiff contends that if overruled the finding and judgment should be for him for \$5000. The defendant insists that the agreement was that if the demurrer was overruled *and* the court found for plaintiff, the amount of the finding and judgment would be \$5000. It was agreed that the losing party had the right to appeal.

The court heard the case and the defendant presented a demurrer as agreed. The court sustained the demurrer and made the following notation on his docket: "Jury waived, tried by the court, verdict for defendant on the whole case on demurrer tendered by defendant." The clerk's minute book contained the same entry. The judgment entered upon the judgment record recited the agreement as plaintiff understands it. It will be found above in our opinion on the motion to modify.

After the trial as just described, the plaintiff duly appealed to this court and we reversed the judgment and remanded the cause, holding that the evidence made issues of fact as to whether plaintiff should recover upon which the trial court should have passed;

and that it was error for the court to rule that the evidence, as a matter of law, failed to make a case. On that appeal defendant denied the correctness of the judgment as entered of record in reciting the agreement, contending that it was as it now insists, and stated that it would proceed in the trial court for a *nunc pro tunc* order correcting the judgment, but stated that that need not prevent this court from going on with a determination of the case as appealed.

Afterwards defendant did institute a proceeding in the trial court for *nunc pro tunc* order correcting the judgment by striking out the words reciting as the agreement that if the court refused a demurrer to the evidence, the finding and judgment should be for plaintiff for \$5000; and that the judgment be made "to conform to the facts in the case."

A trial was had of this motion. Defendant introduced the judge's docket and the clerk's minutes. The clerk of the court testified that the judgment entered in the record was written from a form or draft furnished to him by Mr. Weatherby, one of plaintiff's attorneys, of the firm of Weatherby & Frank. That this form was brought to him by Mr. Weatherby after the trial in November, and that he placed it in his desk "to be entered in due course," and that he did enter it in February. He further testified that the draft or form was not endorsed as correct by the judge or defendant's attorneys.

On plaintiff's motion the oral part of the clerk's evidence was stricken out on the ground that only record evidence was admissible in a *nunc pro tunc* proceeding.

Weatherby testified that he was one of the plaintiff's counsel and was present at both trials. That before the submission of the case at the last trial he and defendant's attorneys made a verbal agreement which he reduced to typewriting, but which was not signed by either party, and that after the case was decided by

the court he, or his partner, as was the custom with that bar, prepared the form of judgment containing this agreement just as it was made with defendant's attorney and he took it to the clerk. That he did not have it endorsed by defendant's attorney or the judge, as that had never been done in his experience at that bar. He further testified that in the prefatory remarks to his argument, one of plaintiff's counsel read to the court the typewritten copy of the agreement in the presence of defendant's counsel.

It was agreed that plaintiff's other attorneys would testify substantially as had Mr. Weatherby. Defendant offered no further testimony and moved to strike out this evidence for plaintiff, on the ground that only record evidence was admissible, and the trial court sustained the motion.

A correction of judgment, after the close of the term, by *nunc pro tunc* proceeding, must be made from the record and not the verbal testimony of witnesses. The trial court was therefore right in striking out such testimony as requested by both parties. Such judgment can only be altered *nunc pro tunc* "upon evidence furnished by papers and files in the case, or something of record, or in the minute book or judge's docket." [Railroad v. Holschlag, 144 Mo. 253; Burns v. Sullivan, 90 Mo. App. 1; State v. Jeffors, 64 Mo. 376.]

We are left in this case with only the record evidence and we have already held in our opinion above on the motion to modify, that there is nothing in such record to justify us in questioning the judgment as entered. The law is that "the judgment appearing upon the record is presumptively the judgment of the court and not an error of the clerk." [Railroad v. Holschlag, *supra*.]

Defendant's position amounts to this,—that the mere silence of the minute book and the judge's docket as to the agreement will overturn the judgment as recorded in the record. If we were to allow that position

to be sound it would destroy not only the agreement in this case, but the whole judgment. For, by reference to the minute book and judge's docket, as copied above, it will be seen that they merely state a trial and verdict, without direction as to any judgment whatever. That the position is untenable we think clear for the foregoing authorities, especially *Jones v. Hart*, and *Kreisel v. Snavelly*, *supra*, and cases therein cited. If every part of judgments entered of record had to be affirmatively authorized by the judge's docket, or the clerk's minutes, the bar of the state has long been in error.

The authorities cited by defendant only show that a judgment erroneously or improperly entered upon the record, may be amended *nunc pro tunc*, when proper evidence may be had from the entries in the judge's docket of the clerks' minutes or other record in the case; and that if it appears therefrom that the clerk has entered a judgment contrary to the one rendered by the court, it will be corrected, as for instance, in *Robertson v. Neal*, 60 Mo. 579, the court rendered a judgment by default and so entered it in his docket; but the clerk entered in the record a final judgment. But that is a state of case widely different from instances where the judge's docket is not inconsistent with and is silent as to parts of the judgment entered in the record.

Our conclusion is that the judgment of the trial court on the *nunc pro tunc* proceedings should be affirmed. All concur.

CITY OF STANBERRY, Appellant, v. JARVE
O'NEAL, Respondent.

Kansas City Court of Appeals. November 11, 1912.

1. **MUNICIPAL OFFENSE: Reasonable Doubt: Malum In se.** In prosecutions by a city under a municipal ordinance for an offense which is *malum in se*, the defendant is entitled to an instruction requiring the jury to give him the benefit of a reasonable doubt.
2. **OFFICER: Arrest: Flight: Firing upon.** In attempting to apprehend one charged with a violation of a municipal ordinance, or a misdemeanor, who has taken to flight, an officer has no right to kill him, or to fire upon him with intent to do so.
3. ———: ———: ———: **Assault with Intent to Kill: Defense of Brother.** Where a city marshal in attempting to apprehend a person fleeing from arrest for violation of a municipal ordinance, attempts to kill him by firing upon him with a pistol, the brother of such person has a right to defend him by resisting the officer.

Appeal from Gentry Circuit Court.—*Hon. W. C. Ellison, Judge.*

AFFIRMED.

James F. Wood and J. W. Peery for appellant.

John A. Showen and R. S. Robertson for respondent.

ELLISON, J.—The defendant was charged with a violation of an ordinance of the city of Stanberry. The judgment in the circuit court, on appeal, was for the defendant. The city thereupon brought the case here.

The question presented is whether in a prosecution for the violation of a municipal ordinance inflicting a punishment of imprisonment in jail for six months, or a fine of \$200, or both, for disturbing the

peace by loud and indecent conversation and quarrelling and fighting, it is proper to instruct the jury in the circuit court that the defendant must be believed to be guilty beyond a reasonable doubt. The general rule requiring such an instruction for all offenses of a high grade is, of course, admitted, but it is claimed that for the lesser grades of offenses, such as those committed against municipalities, the rule does not apply. The reason for this claim is based upon the statement that prosecutions for the violation of municipal ordinances are civil actions; then, assuming that in all civil actions there need be only a preponderance of evidence to sustain the plaintiff, the inference is drawn that such preponderance is all that is required in a prosecution for a municipal offense.

It takes all of these assumptions or claims to justify the conclusion which denies to an accused the right to such an instruction, and we think each of them erroneous. In the first place, the rule requiring proof of the guilt of an accused applies quite as fully to the lesser grades of offenses as to the higher. It applies in prosecutions for misdemeanors. [1 Bishop's Crim. Proc., sec. 1093; Underhill on Crim. Ev., sec. 14; Fuller v. State, 12 Ohio St. 433; Vandeventer v. State, 38 Neb. 592; Stewart v. State, 44 Ind. 237; Sowder v. Commonwealth, 8 Bush. 432; Wasden v. State, 18 Ga. 264; State v. Knox, 61 N. C. 312; State v. King, 20 Ark. 166.] Starkie's Ev. (1 Vol., 451) states that the rule applies to "all criminal cases *whatsoever*." And in Fuller v. State, supra, it is asked: "If the rule is to be applied in cases only involving a certain grade of crime, where shall the line be drawn? And upon what principle shall the distinction be justified? In State v. King, supra, the penalty was a fine only, while, in this case, as we have stated, the punishment may be imprisonment. And in Commonwealth v. Intoxicating Liquors, 115 Mass. 142, which was for a forfeiture of liquors, the court went so far as to hold that the "pro-

ceedings were in the nature of a criminal prosecution," and required an instruction on reasonable doubt.

In the second place, it is improper to consider the fact that our Supreme Court has designated a prosecution for an offense committed against municipal ordinances, a civil action, as was done in *State v. Gustin*, 152 Mo. 108; *State v. Muir*, 164 Mo. 610, and *Canton v. McDaniel*, 188 Mo. 207, as determining the question whether the accused should be deprived of the protection of the rule as to a reasonable doubt. Those cases do not affect that question. The court did not say that such cases were in all respects like those which are commonly understood to be ordinary civil cases, and that in *all* respects the practice, procedure and rights of the parties were the same. There are necessary differences between them in some respects. Thus, it has been ruled, time and again, by the Supreme Court, that such cases are quasi criminal, which is no less than saying that they are like criminal cases in many respects. It was stated in *Stevens v. Kansas City*, 146 Mo. 460, that a proceeding to "punish a violation of a municipal ordinance by fine and imprisonment is civil in form and quasi criminal in character. It is governed by the rules of pleading applicable in civil cases, but if it was solely civil no fine or imprisonment could be inflicted. It is therefore a quasi civil and criminal action. Partaking of some of the features of each, its similitude to either is not complete. In pleading, it is more nearly like a civil action, *but in its effects and consequences, it more nearly resembles a criminal proceeding.*" This language is quoted and approved in *Douglas v. Kansas City*, 147 Mo. 428, 437. In *St. Louis v. Weitzel*, 130 Mo. 600, 612, such proceeding is spoken of as a civil action and not "*strictly criminal*" in its nature (*italics ours*). And in *Kansas City v. Neal*, 122 Mo. 232, 234, it is said to be "civil in form and *quasi criminal* in character." It was therefore held in the *Stevens* case that though the criminal court

only had jurisdiction of appeals in criminal cases, it was proper to appeal a prosecution for a municipal offense to that court. That an arrest and prosecution for a municipal offense is not an ordinary civil action is determined by the statute itself (Sec. 1787, R. S. 1909), which forbids arrest "in any civil action whatsoever."

Among other distinguishing marks are these: The fine which is imposed for a municipal offense, is not a debt, and therefore imprisonment may follow its nonpayment without violating the Constitution forbidding imprisonment for debt. [Ex parte Hollwedell, 74 Mo. 395.] So, when one is arrested on a charge of a municipal offense, he will be imprisoned pending his trial, unless he gives bail; and doubtless, if denied the right to bail, as granted by the Constitution to those accused of crime, he would be protected by the courts. So, doubtless, if prosecuted for such municipal offense as is also an offense against a State law (as in the case at bar) he could not be compelled to testify against himself. [Ex parte Carter, 166 Mo. 604.] So, doubtless, in such case, he would be entitled "to meet the witnesses against him face to face." So he would be presumed to be innocent; and so would his good character be evidence in his behalf. These are rights which do not exist in civil cases. And if it was error to give an instruction on reasonable doubt because this was a civil case, then it follows that it would be error in a like case, no matter how serious the consequences of conviction might be, to instruct that an accused was entitled to be presumed innocent; or that his good character should be considered; and furthermore, it would be error to refuse to compel him to testify against himself.

It would, therefore, seem to be clear that we interpret the ruling of the Supreme Court correctly in holding that where the object sought by the municipality is to punish a person for committing an offense

against its laws directed against things which are not things only wrong because prohibited, but are wrongs *malum in se*, the prosecution is of the nature of a criminal prosecution and the full reason upon which the rule of reasonable doubt is based, applies.

Municipalities may ordain laws forbidding and punishing the same act which is forbidden and punished by the state law. It is common knowledge that the former have ordinances against open adultery, assault and battery, disturbance of the peace, gambling, lotteries, and many other public wrongs, forbidden by the state law. No sound reason can be stated for denying an accused the benefit of an instruction on appeal to the circuit court or criminal court when charged by a municipality, when on trial for the same act, in the same court, he would be entitled to such instruction if charged by the state. It is not an uncommon charter power that cities, as in this case, may prescribe either fine or imprisonment in jail, or both, for a violation of an ordinance. [Ulrich v. City of St. Louis, 112 Mo. 138, 143.] The charter of Kansas City (page 163) grants such power. Now if two persons are charged with living in open adultery and one is prosecuted by the city while the other is charged by the state, the former may appeal to the criminal court, where he will find the other arraigned by the state. Is one to be denied an instruction on reasonable doubt, and, maybe, thereby convicted, while the other is granted such instruction and thereby acquitted? Is that not an incongruity which ought to be avoided?

There is a presumption of innocence which applies in favor of every one accused of the violation of law involving a public wrong, *malum in se*. To overcome this presumption there must be evidence sufficient to convince beyond reasonable doubt. [Lawson on Law of Presumptive Ev., sec. 505; 4 Elliott on Ev., sec. 2706.] Certainly it cannot make any difference

as to which branch of the government seeks to inflict the punishment.

Reasonable doubt is really founded on the presumption of innocence (*Coffin v. United States*, 156 U. S. 432, 459, 460), and the presumption itself is in favor of the life, liberty and good name of the citizen. It is aptly illustrated in a quotation by Justice White in the case just cited. Numerius was on trial before the Emperor Julian, and contented himself with simply denying his guilt, and there was not sufficient proof against him. His adversary, seeing that a failure of the accusation was inevitable, exclaimed: "Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?"—to which Julian replied: "If it suffices to accuse, what will become of the innocent?"

The rule requiring belief of guilt beyond a reasonable doubt, looks much to the serious consequences resulting from conviction,—not alone the punishment, but the humiliation, the disgrace and the future career of the accused are at stake. The natural instinct of the human heart is to take care that such results are not inflicted unless guilt is made so clear that, in reason, a mistake cannot be made. In the ordinary civil action to recover a debt owing from one person to another, the good or bad character of the parties is not in issue (except as to credibility as witnesses), but that cannot be said of many municipal offenses. Is a young woman, surrounded by unfortunate, accidental and embarrassing circumstances, who is prosecuted for the municipal offense of being an inmate of a bawdy house, to be deprived of the benefit of the presumption of innocence and of a reasonable doubt?

The mere fact that prosecutions for municipal offenses are called civil actions, does not say that the rule as to reasonable doubt cannot apply to them; for even though an action is strictly civil, it does not follow that the degree of proof must not be such as to

exclude all reasonable doubt. Thus, to establish a resulting, or implied, trust, the evidence must exclude all reasonable doubt. [Bradley v. Bradley, 119 Mo. 58; Mulock v. Mulock, 156 Mo. 431, and cases cited.] So proof of a promise to a deceased, which prevented his making a will, must be established in the same way. [Mead v. Robertson, 131 Mo. App. 185.] And so in other cases in equity, in avoidance of the Statute of Frauds. [Kirk v. Middlebrook, 201 Mo. 245, 289; Russell v. Sharp, 192 Mo. 270, 285.] And where it is sought to impeach a notary's certificate of acknowledgment to a deed, it has been ruled that the evidence must exclude reasonable doubt. [Gritton v. Dickerson, 202 Ill. 372.]

It may be, though it is not necessary to say, that there are cases of violations of municipal ordinances which only demand that degree of evidence required in ordinary civil cases, such as those ordained for purely municipal regulation, and which do not involve matters *malum in se*. Thus, regulations of awnings, signs, sweeping sidewalks at a certain time of day, regulating speed of vehicles and trains, and the great number of other regulations of acts innocent in themselves and the violation of which is wrong merely because prohibited. But of this we do not express an opinion.

In Peterson v. State, 79 Neb. 132, cited by the plaintiff, the charge was a violation of an ordinance regulating the speed of trains through a town, and it was held that since the act was not a misdemeanor under the laws of the state, and was not immoral, or, in itself criminal, an instruction on reasonable doubt need not be given. We have not such a case as that or any of those just mentioned. The offense charged here is not only a violation of the state law, but it is *malum in se*. The defendant is charged with the disturbance of the peace by quarrelling and fighting and by loud, offensive and indecent conversation. When

conviction is sought in the prosecution of such a charge as that (whether it be called criminal, quasi criminal, or civil), the citizen ought to have the benefit of the presumption of innocence, and he ought not to be disgraced, stigmatized and punished if the evidence leaves the jury in reasonable doubt of his guilt.

The question has rarely arisen in a case of this character, for the reason, perhaps, that the understanding and practice has been that such instructions should be given as of course. It is not improbable that a controlling reason for the legislation allowing appeals from municipal to state courts, is that the accused may have the protection of courts whose procedure allows his rights to be safeguarded by instructions. We have been cited to but one case of like kind in this state, and that is *Town of Glenwood v. Roberts*, 59 Mo. App. 167, in which this court held, in an opinion by Judge GILL, that such instruction should be given. The Judge, after referring to the reason for the rule requiring the guilt of the accused to be shown beyond a reasonable doubt, asks: "Why, then, should not this same solicitude for the liberty of the citizen, or this idea that it is better that ten guilty ones escape than punish one innocent, be applied in such cases as this as where the *state* is the party prosecuting? If, now, this defendant had been prosecuted for a misdemeanor under the general statutes where the like punishment would be visited as in case of violation of a municipal law, unquestionably he would have been entitled to an instruction telling the jury that his guilt must have been shown beyond a reasonable doubt; and if in the latter, why not in the former."

There was evidence in behalf of the city tending to prove that defendant's brother was on the streets of the city, "very badly under the influence of whisky," and that he was accompanied by two others, and that the city marshal asked defendant "if he wouldn't take his brother home." Defendant himself testified that

when the marshal told the boys to keep still or he would "run them in," he volunteered to take his brother home. But it is of no particular difference which first made the suggestion, for it seems to be settled that defendant was to take his brother off the street and that he took hold of him and started away. There was evidence tending to show that he had gone but a few steps, peacefully getting his brother away, when the marshal ran up and overtook them, and struck at defendant with his club; that defendant partially warded off the blow, so that it only knocked off his hat, and that then the intoxicated brother knocked the marshal down and started to run, the marshal raising up with a drawn revolver and shooting at him several times, some of the shots going into stores nearby. Excitement followed and many people came upon the street. There was evidence tending to show that prior to this time defendant had not used any harsh or offensive language, or disturbed any one, but that afterwards, while being assaulted and while the marshal was attempting to kill his brother (for the marshal testified that: "I was doing the best job of shooting I could"), he was loud in the use of profane language. Taking the evidence in defendant's behalf, it is manifest that his profanity was indulged in, in the excitement of his protest and effort against the marshal's conduct.

The offense defendant's brother had committed was being drunk and using disorderly language on the streets. He was not arrested for that, but while defendant was taking him home, the marshal, according to his own testimony, ran after defendant for cursing him, and, it may be admitted, undertook to arrest him,—whereupon the intoxicated brother interfered,—resisted defendant's arrest,—by knocking the marshal down. He was thereby guilty of two offenses, one in resisting an officer who was undertaking to make an arrest for a misdemeanor, and the

other for assault and battery, both offenses being misdemeanors. He then began to flee. The most that can be said is that the marshal then undertook to arrest him for one or the other, or both, of these offenses, by firing upon him with his pistol. An officer cannot take a man's life who is fleeing from arrest for a misdemeanor. If he does, he is guilty of murder or manslaughter. Therefore, the marshal in attempting to kill defendant's brother, was guilty of an assault with intent to kill. [State v. Coleman, 186 Mo. 151, 162; Thomas v. Kinkead, 55 Ark. 502; Reneau v. State, 2 Lea (Tenn.), 720.] To run from arrest for a low degree offense, is not punishable by death. In judging of defendant's guilt, it should not be forgotten that, under our statute (Sec. 4451, R. S. 1909) he had the legal right to defend his brother from the officer's unjustifiable attempt on his life.

On account of such evidence, and the law applicable thereto, the trial court gave an instruction for defendant which plaintiff claims exonerated him if he uttered the offensive language after the marshal shot at his brother. It is true the word "thereafter" is used, which would mean, in some connection, after the affair was a past matter, but it is clear from the record that it was here used and was understood in the sense of not being before the offensive conduct charged against the marshal. At any rate we do not believe it materially affected the result.

These considerations lead us to conclude that the instruction does not justify a reversal of the judgment. In the stress of the situation of a man, himself unjustly assaulted with a club, and a rapid-fire revolver opened on his fast fleeing brother, it ought not to be expected that his choice of language would be as select, nor the modulation of his voice as perfect, as under less exciting and provoking circumstances it might have been.

Since the foregoing was written, we have been cited to *King City v. Duncan*, just decided by the Supreme Court (142 S. W. 246), where it is ruled that in prosecutions for municipal offenses, on appeal to the circuit court, the verdict must be unanimous; and that an accused is entitled to the presumption of innocence, and that he cannot be convicted unless the proof establishes his guilt beyond a reasonable doubt.

The judgment is affirmed. All concur.

**RICHARD HOLMES, Respondent, v. ROYAL LOAN
ASSOCIATION, Appellant.**

Kansas City Court of Appeals, November 11, 1912.

1. **BUILDING AND LOAN ASSOCIATIONS: Bonus: Premium: Interest.** The bonus or premium for obtaining a loan from a building and loan association, is a certain and definite sum paid for the loan and is distinct from the rate of interest. It cannot consist of a rate per cent payable indefinitely.
2. ———: ———: ———: **Bonus as Per Cent of Loan.** The statute (Sec. 3389, R. S. 1909) providing that a building and loan association may dispense with bids for loans and that such loans may be made to members at such rate of interest and premium as may be provided by by-laws, such premium to be paid in gross installments, does not mean that the premium can be made a per cent of the loan payable monthly during the whole time the money may be unpaid.
3. ———: ———: ———: **Bonus: Per Cent of Principal.** The statute (Sec. 3389, R. S. 1909) in providing that a premium or bonus can be a certain per cent, means a certain per cent of the principal as an ascertained sum, and not a rate per cent during the whole time the loan may remain unpaid. Different provisions of the statute discussed.
4. ———: ———: ———: ———: **Interest: Usury.** A bonus or premium for a loan is not interest, and if, under the name of bonus or premium an additional rate of interest is added, which, together with interest proper, makes a greater per cent than the lawful rate of interest, it will be usury.

5. ———: ———: ———: ———: Second Appeal. Where an appellate court remands a case to the trial court with directions to ascertain the amount due on the notes and enter a decree of foreclosure for the same, such order does not mean a decree for plaintiff even though the trial court should find nothing was due.
6. ———: ———: ———: Res Adjudicata: Second Appeal. If an appellate court erroneously decides a case, or erroneously states the law, it may in clear cases and to avoid manifest injustice, make a contrary ruling in the same case on a second appeal.

Appeal from Gentry Circuit Court.—*Hon. W. C. Ellison, Judge.*

AFFIRMED.

J. W. Peery, J. E. Watkins and Rusk & Stringfellow for appellant.

J. W. Sullinger for respondent.

ELLISON, J.—Defendant is a building and loan association, from which plaintiff borrowed six hundred dollars on the 21st of December, 1896, and for which he executed his bond and deed of trust on his real property to secure its payment. Contending that the loan had been paid, plaintiff, in February, 1906, brought the present action for an accounting and a cancellation of the deed of trust. Defendant filed a cross-bill denying the bond had been paid in full and alleging that there was still due thereon (including interest) the sum of \$255, and prayed a foreclosure of the deed of trust. The deed of trust recites that plaintiff had borrowed \$600 on six shares of stock, and provided that it should become void on the payment by plaintiff of said \$600, interest and premium, in manner set forth in a certain bond executed by plaintiff. By the terms of this bond plaintiff and his wife acknowledged themselves indebted in the sum of \$600

for money borrowed, in consideration whereof they bound themselves to pay three dollars and sixty cents each month as dues on stock, three dollars each month as interest on the loan, and three dollars each month as "premium on said shares of stock," all and each of the monthly payments to continue "until the said principal sum and interest and premium thereon shall have been paid in full . . . by said shares . . . having reached their par value."

Plaintiff paid these monthly installments for ninety-one months, \$115.20 a year for seven years and seven months, aggregating \$873.60.

The matter was referred to R. L. McDougal, Esq., to hear the evidence and make report of his findings and the testimony heard by him. Subsequently and in due form, he made his report, in which the sum found to be due on the mortgage was \$269.06. In arriving at that result he found the loan to be usurious and gave plaintiff credit for the interest paid, but he refused credit for monthly payments on stock dues of three dollars and sixty cents for seven years and seven months. In other words, he refused to allow credit for the withdrawal value of the stock.

The trial court agreed with the referee that the loan was usurious and that plaintiff should be credited on the principal debt with usurious payments as provided by the statute (Sec. 7183, R. S. 1909). [McDonnell v. DeSoto Loan Ass'n, 175 Mo. 250, 272; Arbuthnot v. Ass'n, 98 Mo. App. 382.] But the trial court found error in the referee refusing to credit plaintiff with his payments on stock. The defendant agrees the trial court was right and the referee wrong, as to crediting the payments on stock, but insists the referee and the court both erred in finding the loan to be usurious; and that is the question which is presented for our decision. Its determination turns on the question whether the monthly three per cent charge during the

whole time the loan was unpaid, was a legal charge for a premium.

The statute, sections 1363, 1364, R. S. 1899, which are sections 3390 and 3391 of the revision of 1909, provides that premiums for loans shall consist of a percentage on the amount loaned, in addition to interest; and that such premium shall not be considered usury unless it should be "unreasonable and extortionate."

So therefore, if in making the loan to plaintiff, defendant has provided for such a bonus or premium in addition to interest as is allowed by the statute, it does not render the loan usurious. On the other hand if, in providing for what defendant calls a bonus, provision has really been made for a rate of interest in excess of that allowed by law, it is usurious; for the law is, that for defendant to enjoy the extraordinary privilege of immunity from the usury laws which apply to the community in general, it must, with substantial precision, track the course set forth in the statute as a requisite to such immunity. Such has been the rulings in this state and so it was held under a like statute in Illinois. [Free Home Bldg. & L. Assn. v. Edwards, 223 Ill. 126.] In that case the court stated that: "Usury is prohibited by our statute, and while homestead and loan associations are authorized to charge more than the rate of interest allowed by our interest laws, they can only do so by a compliance with the act under which they are incorporated. . . . It is just as illegal and contrary to public policy for associations like appellant to charge more for a loan than is allowed by our interest laws, without a compliance with the provisions of the statute authorizing them to do so, as it would be to charge a usurious rate in the absence of a statute."

The sections of the statute (Sec. 1362, R. S. 1899, Sec. 3389, R. S. 1909) directing how loans shall be made, provides: First, that loans may be offered to stockholders who shall bid the highest premium; and

this premium "may be deducted in gross from the loan, or it may be charged and be required to be paid in installments." Second, if the stock is issued in series or at different times, so as not to mature at the same time, then the borrower only pays such proportion of the full premium as the number of months his stock lacks of being 120 months old, bears to 120 months. Third, the association may however provide in its by-laws that instead of a premium the bid for a loan may be a stated rate of annual interest upon the sum desired, payable in periodical installments; such bids shall be the interest to be paid during the whole period of the loan. Fourth, if a by-law of the association so directs, bids may be dispensed with and loans may be made to members at such rate of interest and premium as may be provided in the by-laws, "such premium to be paid in gross installments."

It will be observed that all the foregoing provisions except the last one, concern loans which are auctioned off to the highest bidder. In supposed compliance with the last one, the association passed the following by-law dispensing with bids, under which the loan in controversy was made: "Bidding for loans shall be dispensed with and, in lieu thereof, interest at the rate of six per cent per annum shall be charged, payable in monthly installments of fifty cents per month on each \$100 borrowed, and a premium of fifty cents per month on each \$100 borrowed shall be charged, payable monthly." A construction of the statute clause, in connection with this by-law, will determine the case. It will be observed that that clause does not dispense with a premium and authorize a loan at any rate of interest which may be bid, as may be done under the third clause. If the money is loaned under that clause, without a bid, and a bonus is charged, it is a charge in addition to interest. It is apparent throughout the statute that interest and a bonus or premium are two different things. The very

act of providing, as in the third clause, that a premium may be dispensed with and interest alone substituted, emphasizes the distinction between them. And more than this, the third clause provides that when premiums are dispensed with and interest is substituted, it must be a stated rate of annual interest payable in installments "*during the whole period of the loan.*" But the fourth clause, in permitting premiums "to be paid in gross installments," does not say that such installments may be required during the whole period of the loan. The plain inference is the contrary, that is to say, that the premium is a certain sum, a certain per cent of the principal, divided into installment payments. Installment means a part of a greater amount, and it is a word only fitly used in connection with an ascertained amount; especially is this true when it is qualified by the word "gross;" and when the statute says such premium shall be paid in gross installments, it is no more nor less than saying that the premium shall be in gross, payable in installments.

It is suggested that section 1363, R. S. 1899, section 3390, R. S. 1909, says that premiums shall consist of a percentage on the amount loaned; but that does not mean a rate per cent for the uncertain period the money may be kept. It means a certain per cent or part of the sum borrowed is bid by the borrower, and that it is either retained by the association out of the sum loaned, or the amount which that per cent would make is divided into installment payments and incorporated in the note; and that is what is expressly contemplated by the first clause of section 1362, R. S. 1899, section 3389, R. S. 1909, which reads that "said premium bid may be deducted in gross from the amount of the loan, or may be charged, and be required to be paid in proportionate amounts or installments, at such time during the existence of the shares of stock loaned or advanced upon as may be provided in

the by-laws of the association." And so under the last clause of that section (under which this loan was made), when the loan is not by bid, the premium is a certain per cent of the sum loaned, the amount of which is ascertained and divided into gross installments and thus paid.

It being thus clear that interest and premium are two different things, we ask what the difference is? It is this: Interest is a certain rate per cent of the sum loaned for the time the money is detained by the borrower; while a bonus or premium is a definite sum agreed upon which is paid in addition to interest, either in advance, or by installments (authorities hereinafter cited). And such is, undoubtedly, the meaning of our statute.

Now in the bond in question, what is called a premium is merely a rate per cent of interest for the *whole time the money is unpaid*. The law will not allow the mere act of calling interest a bonus, to make it so, for they are not the same thing. To merely change the name of an article leaves the article itself unchanged. In this bond either two premiums are demanded, or double interest is exacted; for the interest and what is called the premium are but duplicates, each of the other. They are the same rate per cent and run for the same uncertain period. If the Legislature intended that interest could be called premium, why the necessity of the repeated use of the latter word?

We find the same view taken of similar loans in other jurisdictions. In Connecticut a building and loan statute permitted the loan of money at interest, and, as in ours, a bonus in addition for the privilege of the loan. Stock was subscribed and a loan was made and a note taken promising to pay the principal and interest "and a bonus of three-fourths of one per cent per month, in addition to the interest, both interest and bonus payable monthly in advance."

This was held to be usury, the court saying: "For although one portion of the sum to be paid for the use of the money is called interest, and another portion a bonus, yet in truth, and in fact, it was nothing more nor less than a contract to pay fifteen per cent for such use. [Mutual, etc. Building Ass'n v. Wilcox, 24 Conn. 147.] The court further stated that while the Legislature authorized a bonus in addition to interest, yet by use of the word bonus "they meant something definite; something distinct, and independent of the interest, in the ordinary acceptance of the term; a definite sum for a loan for a specified time, and not anything which the parties, in their contract, might choose to denominate a bonus."

In *Washington Nat. Bldg. Loan & Invest. Ass'n v. Stanley*, 38 Ore. 319, there was a loan of \$500, for which a note was given promising to pay the principal "with six per cent interest per annum, and six per cent premium per annum, thereon, from date until paid," and it was held to be usury on the ground that while the statute of Oregon authorized a building and loan association to charge a bonus in addition to interest, it did not permit usurious interest to be charged under the name of a bonus. And that a bonus was a definite sum agreed upon, while the promise of a bonus in that case was for an indefinite sum in the way of rate per cent for the uncertain time the money might not be paid. The court said that there was no authority for "fixing of a premium by a rate per cent or by a percentage upon the amount of the loan, and dependent for the time of its continued payment upon the length of time the loan may remain unpaid, or the stock of the borrower be not fully paid in. There is nothing in such a condition to distinguish it from interest, and the Legislature surely did not intend to say that interest shall not be treated as interest, or that interest, to be collected by the designation of premium, shall not be treated as inter-

est. So that, when the statute speaks of the rate of premium, it does not mean the same thing as the rate of interest. The more natural and consistent interpretation would be that, when the Legislature speaks of a rate of premium, it means a proportional or pro-rata distribution of the payment of a premium, fixed by the by-laws or by resolution of the board of directors of the association. If it does not have this meaning, it has no other than will distinguish it from interest, and the act cannot be held to sanction the taking of any premium at all under the appellation of 'rate of premium.' The idea of a rate premium corresponding to rate of interest is not within the spirit and intendment of the law of building associations,"

In *Gray v. Baltimore Building & L. Ass'n*, 48 West Va. 164, it was in terms decided that while a building and loan association may fix a premium payable in installments, such premium must be a definite and certain sum, "and not a percentage payable indefinitely at fixed periods;" and that such percentage payable indefinitely at fixed periods, though called a premium in the obligation, is interest under another name. The court said: "The present question is, has the association the right to fix a minimum premium at a certain percentage on the amount borrowed, payable indefinitely at fixed periods? In other words, under the name of 'premium,' to increase the rate of interest? If such is the case, the association could not be guilty of taking usury, it matters not how high its rate of interest might be fixed, so the word 'premium' is substituted for the word 'interest.' To demand 12 per centum interest would be usury, but to demand 6 per cent interest and 6 per cent premium would not be usury. Such an evasion is too transparent to escape condemnation, and cannot for a moment be upheld. And if there is any language in the *Archer* case that leads to such a conclusion it is dis-

approved. A minimum premium may be fixed under the law, but it must be a lump sum, certain and definite, which may be paid in advance or in periodical installments. Under the pretense of fixing such premium, the legal rate of interest may not be increased indefinitely."

The same thing was again decided in *McConnell v. Cox*, 50 West Va. 469.

It seems to us that if we keep in mind the distinction the Legislature has made in using the two words, it becomes manifest that the contract evidenced by the bond and mortgage in controversy must be considered as not within the statute, and therefore usurious. Repeating what we have already written, the statute permits a loan to be made without bids at a rate of interest, and a premium which may be paid in gross installments. The interest, as contemplated by the statute, is a continuing charge for the use of the money so long as the borrower uses it; while the premium is a sum promised for the privilege of obtaining the loan, and the word, used as it is in connection with interest, necessarily means a certain sum. How, in reason, could a borrower be supposed to promise to pay for the privilege of a loan which is to draw interest, a sum he could not know the amount of? Payment for the privilege of *obtaining* a loan is something entirely different from payment for the *continuation* of a loan. And if we should conceive that one, to obtain the privilege of a loan, would agree to pay a premium, *indefinitely* continued, in addition to the regular rate of interest, it would be come necessary, under Sec. 1364, R. S. 1899, that we consider it to be unreasonable and in its spirit usurious and oppressive, and not allow to it exemption from our usury statute.

The statute (Sec. 1364, R. S. 1899; Sec. 3391, R. S. 1909) providing that no interest not extortionate or unreasonable, etc., shall be considered usury, may

cause the suggestion to be made that we should not designate the premium charged here as interest and therefore usury. It is probable that the statute referred only to such interest as it authorizes and designates by that name. But the suggestion can be of no practical importance in this case. For, if we call the charge a premium, as it is designated in the bond, the same result follows; since it is not a charge recognized by the law as a premium, and should therefore be credited as a payment on the bond, thus having the same practical effect as if it were called usurious interest.

But it is insisted that the case was determined in defendant's favor when here on the first appeal and that all matters connected with the case which plaintiff presented to the trial court after the cause was remanded, are *res adjudicata*. There is no merit in this. On the former appeal before entering upon the chief and substantially, the only matter for decision, we held that plaintiff was not under duress when he signed the bond and deed of trust. We then said that: "The question in the case is this: Was the defendant association at the time it made the loan doing business under the Amendatory Act of June 21, 1895, or under the act that previously existed? If under the latter for want of competitive bidding as the statute there required the loan was an ordinary one and the monthly payments in excess of six per cent per annum were usurious and the plaintiff is entitled to relief as the payments he has made has discharged the debt with the legal rate of interest." [Holmes v. Loan Assn., 128 Mo. App. 329, 334.]

And defendant stated that that was the only question, as is shown by the following excerpt from its brief on the first appeal: "This loan was made without competitive bidding. Plaintiff claims that defendant association never became authorized to act under the laws of 1895, and that therefore, it had no right when this loan was made to dispense with competitive

bidding and make a loan for a stated amount of premium and interest. *This is the question to be decided by this court and, as we believe, the only question.*" (Italics ours.)

We stated that if the defendant was doing business under that amendment, competitive bidding was not required and that premium and interest in excess of the legal rate would not be usurious. We then, at length, gave our reasons for holding that the defendant was acting under the law as amended; and on the matter of notice for meeting of stockholders to adopt a by-law under the amended statute, we differed from the Supreme Court of Kansas in a case of this defendant against Forter, 68 Kan. 468. Then, assuming that as defendant could make loans without competitive bidding, the loan to plaintiff was otherwise legally made, we remanded the cause with directions to the trial court "to ascertain the amount still due defendant on said notes and to decree a foreclosure of the deed of trust to satisfy the same." But it was not a part of this court's meaning or intention that the trial court should ascertain some amount to be due defendant if in point of fact nothing was due. It is too clear for cavil that this court did not intend that plaintiff, in order to save his property from sale, should be compelled to make further payments, if those already made had discharged the bond.

But, should we concede that the court did intend to say that some amount was due defendant at all hazards, and that the trial court should proceed to fix or ascertain that sum, it will not avail defendant as *res adjudicata*. For even on the same question, in the same case, the rule that the decision on a former appeal prevents a consideration of that question on a later appeal, is not unalterable and without exception and is not applied where "gross or manifest injustice has been done." This is stated in *Hamilton v. Marks*,

63 Mo. 167, and has been repeated time and again from then till now. [Gwin v. Waggoner, 116 Mo. 143, 151; Bird v. Sellers, 122 Mo. 23, 32; Bealey v. Smith, 158 Mo. 515, 523; United Shoe Mach. Co. v. Ramlose, 231 Mo. 508; Mangold v. Bacon, 237 Mo. 496; also the recent case of Bagnell Timber Co. v. Ry. Co., 145 S. W. 469.] Especially will it not be applied where the question in the last appeal was not decided in the first. In the case of Gwin v. Waggoner, *supra*, it is said that: "Notwithstanding the doubt that must arise from the apparent inconsistencies in these decisions as to the circumstances under which exceptions and qualifications will be made, we think it can be safely said without going outside any of the cases, that in order that a decision may operate as an estoppel on a subsequent appeal of the same case, the question must have been fairly presented to the court as necessary to a decision in the case and directly considered and decided. Parties should not be concluded upon questions that are decided by mere implication arising from the general disposition of the case or those which were merely collateral to the matter actually considered.

An examination of the opinion of the court on the former appeal will show that the only question carefully considered and directly passed upon by the court was regarding the correctness of the trial court in giving an instruction to the effect that the deed made by plaintiff to defendants was *prima facie* evidence that the transaction was a sale. As to this issue the court said: 'The disposition of the case must, we think, turn upon exceptions taken in this behalf,' and we find that the consideration of the court was given entirely to that point."

The result of our conclusion on this point may be thus stated: We decided on the first appeal that the defendant had properly brought itself under the Amendment Act of 1895, but we did not consider or decide

that this loan had been made within the terms of that law.

The judgment is affirmed. *Broadbuss, P. J.*, concurs. *Johnson, J.*, not sitting.

MARY E. JOHNSON, Appellant, v. E. A. JOHNSON,
Administrator, Respondent.

Kansas City Court of Appeals, November 11, 1912.

1. **IMPLIED CONTRACT: Family Relation: Instruction.** A married daughter rendered services, such as washing, to her father who lived alone. There was evidence tending to show that she did not intend to have him pay for such service. *Held*, that it was proper to instruct the jury that in passing on the question of an implied contract to pay, they had a right to examine the circumstances shown in evidence, including the relationship of the parties.
2. ———: ———: ———: **Payment to Debtor: Evidence.** Where the evidence showed that a married daughter paid to her father a note of \$388 after her account for services against him was charged to have accrued, it was *held* to be evidence tending to show that she did not intend to charge for such services.
3. ———: ———: ———: **Argument: Practice: Court's Rulings.** It is not proper practice for counsel to state to the jury in his closing argument what the court would have ruled had plaintiff offered herself as a witness. The court's rulings should be announced by the court.

Appeal from Nodaway Circuit Court.—*Hon. Wm. C. Ellison*, Judge.

AFFIRMED.

J. C. Growney for appellant.

Cook, Cummins & Dawson for respondent.

ELLISON, J.—Plaintiff's action is to recover \$550 for eleven years services, principally in washing,

at fifty dollars per year, rendered to her father in his life time. The verdict and judgment in the trial court was for the defendant.

There was abundant evidence to sustain the verdict, and we will therefore only need to examine into alleged errors said to have taken place at the trial. There was evidence tending to show by direct and reasonable inference that plaintiff did not intend to charge her father for the services rendered. It is true that it shows she was a married woman, who not living with her father, but it likewise has a tendency to show that whatever she may have done for him was caused by the fact that she was his daughter and that he, living alone, needed her assistance at times. There was other evidence, showing she and her husband gave and paid a note for \$388 after her account in suit had accrued. Notwithstanding evidence of this character, plaintiff complains of the court refusing an instruction offered by her which directed a verdict for her unless the jury believed there was a contract between them that a charge should not be made. Under this instruction the jury may have believed that plaintiff rendered the service to her father gratuitously without expecting pay, yet unless there was a contract between them that she would not make a charge, the verdict must nevertheless be for her. The instruction was properly refused.

An instruction was given for plaintiff which properly submitted every hypothesis to which she was legally entitled. It informed the jury that where labor and services were rendered, a contract of hiring was presumed; but that the relationship of the parties might raise a presumption that no charge was intended; and that it was a question for them to decide, taking into consideration all the circumstances, whether there was an implied agreement to pay plaintiff. They were further directed that if they believed

it was understood between plaintiff and her father that he should pay her, she should have the verdict.

The instructions for defendant were unobjectionable. They are not open to the criticism that they assumed plaintiff's services were intended as a gratuity. One instruction is said to be erroneous for the reason that there was no evidence that the services were intended as a gratuity without expectation of pay. We have already seen that there was ample evidence of that nature. It was not shown in words, that plaintiff had stated she was not expecting to be paid, but there were many convincing circumstances tending to show that to be the fact.

One of defendant's instructions was based on the theory of a settlement or payment, and it is claimed that there was no evidence upon which to base it. The record shows there was.

The chief complaint concerns the action taken by the court on an objection made by defendant's counsel to a part of the closing argument of plaintiff's counsel, wherein he undertook to explain to the jury why plaintiff had not been a witness in her own behalf and stated what the court would have ruled if she had been offered. The court ruled this to be improper, stating that it was not proper for counsel on either side to refer to the fact that she did not testify, leaving an impression that the jury might be regarded that as a circumstance for or against her. It was not proper argument for counsel to assume to tell the jury what the law was to plaintiff's right to testify and what the court would have ruled in that regard. What the court's rulings would be are matters for the court's announcement. The correct practice would have been to have asked an instruction from the court, if nothing had arisen in the trial giving plaintiff a right to testify, and if it was deemed proper to have a ruling on that point, wherein the jury could have been directed

not to allow the fact of plaintiff's not testifying to prejudice the case for or against her.

Authorities on the general subject of claims presented against estates by relatives of the deceased, may be found collected in plaintiff's brief. None of them has any bearing against the views herein expressed.

The judgment is affirmed. All concur.

INDEX.

By LEWIS LUSTER.

ACTIONS.

Premature Actions. The general rule is, that the plaintiff can succeed only when he has a cause of action at the time he commences suit, and if anything is necessary to be done to make his cause of action complete, it must be done before the suit is commenced. *Lawler v. Vette*, 342.

ADMINISTRATION.

1. **Partnership Estates: Priority of Claims.** While a firm member may be a creditor of his firm, he can only be a secondary creditor, that is, however unequally the members of a firm may have contributed to the firm assets, and however much the firm may be owing any member thereof on account of such excess contributions, no firm member can take anything from an insolvent firm's estate in process of liquidation until after all of the general firm's debts have been satisfied. *Elevator Co. v. Thomson*, 170.
2. **Allowance of Claims: Equitable Priority: Res Adjudicata.** The right of equitable priority is not affected by the statutes relating to the allowance and classification of demands and the equitable priorities of creditors are not foreclosed by a judgment of allowance and classification. *Ib.*

ADMISSIONS.

Agency: Evidence. The admission that the driver was in charge of and was driving the defendant's wagon is prima facie evidence that he was engaged in the defendant's business. *Van-neman v. Laundry Co.* 685.

APPEAL AND ERROR. See Bill of Exceptions.

1. **Admission of Evidence: Harmless Error: Instructions.** Error in the admission of evidence of representations by the seller's agent prior to the contract of sale sued on was cured by an instruction given on behalf of the seller that all representations pertaining to the subject matter of the contract were merged in the contract, and only the terms of the contract should be considered in determining the right of recovery. *Compressed Air Co. v. Fulton*. 11.
2. **Same: Immaterial Evidence: Harmless Error.** The admission of evidence that is merely immaterial does not constitute reversible error. *Ib.*

APPEAL AND ERROR—Continued.

3. **Motion for New Trial: Necessity of Specifying Errors.** Rulings on the admission of testimony, not assigned as error in the motion for a new trial, are not reviewable. *Compressed Air Co. v. Fulton*, 11.
4. **Sufficiency of Assignments of Error: Clerical Errors.** Where the plaintiff is the appellant, an assignment of error in the motion for a new trial, that the court erred in admitting incompetent, irrelevant and immaterial evidence "offered by plaintiff," does not present for review the erroneous admission of evidence offered by defendant, even though the use of the word "plaintiff" was a clerical error. *Ib.*
5. **Admission of Testimony: Necessity of Objecting.** The admission of testimony is not reviewable where no objection was made to it at the time it was offered. *Ib.*
6. **Same: Timely Objection: Trial Practice.** Where no objection is made to a question propounded to a witness, an objection to an answer which is responsive to the question, on the ground it is a conclusion of the witness, comes too late. *Ib.*
7. **Motion for New Trial: Necessity of Specifying Errors.** Where the giving of certain instructions is complained of in the motion for a new trial, the instructions not thus specified are not reviewable. *Ib.*
8. **Assignments of Error: Sufficiency of Record.** Where the record failed to show what modifications were made in the appellant's requested instructions, an assignment of error based upon such modifications will not be considered. *Ib.*
9. **Motion for New Trial: Necessity of Specifying Errors.** A ground, alleged in the motion for a new trial, that the court erred "in modifying and giving as modified instructions Nos. — asked by plaintiff," is insufficient to preserve any error for review, on appeal. *Ib.*
10. **Refusal of Instructions: Necessity of Excepting.** The refusal of instructions is not reviewable unless an exception is saved thereto. *Ib.*
11. **Abstract: Opinion of Trial Court.** The written opinion of the trial court, trying a case without a jury, cannot be noticed on appeal, when not set out in the abstract of the record. *Prendergast v. Graverman*, 33.
12. **Conclusiveness of Finding.** A finding on conflicting testimony of witnesses before the court, trying the case without the jury, is conclusive on appeal. *Ib.*
13. **Disposition of Equity Case: Erroneous Exclusion of Evidence.** Where, upon the reversal of a suit for a mandatory injunction for the prejudicial exclusion of evidence offered by the defendant, it appears that, by reason of such exclusion, the plaintiffs had no opportunity to meet the excluded evidence, the case will be remanded for a new trial, although the excluded evidence is before the reviewing court. (*NORTONI and CAULFIELD, JJ., concurring.*) *Grandstaff v. Bland*, 41.
14. **Failure to File Transcript in Time: Waiver of Right to Affirmance.** Although the appellant fails to file a manuscript or a

APPEAL AND ERROR—Continued.

"short" record in the appellate court at least fifteen days before the first day of the term to which the appeal is returnable as required by section 2047, Revised Statutes 1909, yet if the respondent does not produce in such court a certificate of the clerk of the trial court, stating the title of the cause, the date and amount of the judgment appealed from and against whom rendered, the name of the appellant and the time when the appeal was granted, as a basis for a motion to affirm the judgment, in accordance with the provisions of said section, he is not entitled to invoke it. *Gaar-Scott & Co. v. Nelson*, 51.

15. **Same: Laches.** And, in such a case, where the respondent does not move for an affirmance until after the appellant has filed a "short record" and has gone to the expense of preparing and printing the record and a brief, his laches will bar the invocation of the statute to the end of having an affirmance of the judgment. *Ib.*
16. **Failure to File Abstracts and Briefs in Time: Enforcing Rules: Discretion of Court.** Rule 21 of the St. Louis Court of Appeals, which provides that the failure of appellant to file abstracts and briefs within the time required shall result in a continuance or dismissal of the appeal, at the option of respondent, is subject to enforcement or not, in the discretion of the court; it being the practice of appellate courts, in exercising their discretion in the matter of enforcing their rules, to endeavor to do justice and to prevent a miscarriage of justice which might follow from insistence upon the strict requirements of the rules. *Ib.*
17. **Same.** In a case where the appellant failed to file abstracts and briefs within the time required by Rules 12 and 18 of the St. Louis Court of Appeals, *held*, that the court would, under the circumstances of the case, exercise its discretion by refusing to enforce Rule 21, providing that the failure to file abstracts and briefs, shall result in a continuance or a dismissal of the appeal, at the option of the respondent. *Ib.*
18. **Omissions in Abstract: Failure to File Counter Abstract: Presumptions.** Where respondent does not file an additional abstract, as authorized by section 2048, Revised Statutes 1909, it will be assumed that omissions in appellant's abstract relate to immaterial matters. *Ib.*
19. **Docket Fee: Payment in Trial Court not Jurisdictional.** The failure of an appellant to pay the docket fee to the clerk of the trial court in accordance with section 2041, Revised Statutes 1909, is not jurisdictional and does not invalidate an appeal otherwise properly allowed. *Schafer v. Roberts*, 68.
20. **Jurisdiction: Supreme Court: Courts of Appeals: Subsequent Appeals.** Where a plaintiff claimed an amount in his petition exceeding the jurisdiction of the Court of Appeals, and was defeated in the circuit court, the Supreme Court has jurisdiction of his appeal, and if the case be remanded for a new trial, in which plaintiff recovers a sum within the jurisdiction of the Court of Appeals, the Supreme Court will nevertheless have jurisdiction of the defendant's appeal. The statute contemplates that a case once properly appealed and heard by the Supreme Court, that court has jurisdiction of all subsequent appeals regardless of amount. *Rourke v. Railroad*, 207.

APPEAL AND ERROR—Continued.

21. **Abstract: Motion for New Trial: Record Proper.** That a motion for a new trial was filed must appear from the abstract of the record proper, and it is not sufficient that it appears from the bill of exceptions. *Walker v. Fritz*, 317.
22. **Same: Necessity of Showing Timely Filing.** The appellate court cannot infer that a motion for a new trial was filed at the term at which the trial was had, merely because it was filed the next day after the verdict was returned and the judgment rendered, but the abstract of the record proper must show that it was filed at the same term. *Ib.*
23. **No Motion for New Trial: Scope of Review.** Where the abstract of the record proper does not show that a motion for a new trial was filed at the term at which the trial was had, the petition, answer, reply and judgment are the only matters for consideration, and, in the absence of any error therein, the court must affirm the judgment. *Ib.*
24. **Trial Practice: Mode of Saving Points: Premature Action.** The point that a suit was prematurely brought may be raised by offering an instruction in the nature of a demurrer to the evidence and excepting to its refusal. *Lawler v. Vette*, 342.
25. **Questions Reviewable: Ruling Favorable to Appellant.** In an action for personal injuries, where plaintiff failed to call her attending physician as a witness, and the court refused an instruction offered by defendant that such failure was a strong circumstance against plaintiff, but gave one as favorable to defendant as the circumstances would permit, and defendant alone appealed, the appellate court will not decide whether or not any instruction should have been given on such subject. *Edwards v. Railroad*, 428.
26. **Theory in Trial Court: Binding Effect.** In an action for personal injuries, where defendant did not suggest in the trial court that plaintiff had waived the incompetency of her attending physician to testify against her, but asked the court to require plaintiff to waive her right, and, on that request being denied, placed the physician on the stand as a witness and asked him questions which were excluded on the ground they called for a privileged communication, and defendant did not then suggest that the privilege had been waived by plaintiff, the question of whether or not there was such waiver was not reviewable on appeal, under the rule that a party will not be allowed to assume, in the appellate court, an attitude inconsistent with that taken by him in the trial court. *Ib.*
27. **Conclusiveness of Verdict.** Where a question is properly submitted to a jury on conflicting evidence, their finding is conclusive. *McNulty v. Railroad*, 439.
28. **Review of Admission of Deposition: What Record Must Show.** To review the admission of a deposition, over the objection that there was nothing to show the witness was out of the court's jurisdiction, the whole deposition, including the certificate of the officer taking it, must be preserved in the record. *Klages v. Mueller*, 540.

APPELLATE PRACTICE. See Appeal and Error: Crimes and Punishments, 1, 2; Divorce, 1; Principal and Agent, 1.

1. **Assignments of Error: Sufficiency.** The appellate court will not review the instructions given, where the appellant, although challenging them, fails to assign any particular error to them or any of them. *Roberts v. Piedmont*, 1.
2. **Injunctions: Scope of Review.** While, on an appeal from an order granting a temporary injunction, great deference is paid to the trial court's conclusion, yet, on a final decree, the appellate court, as in all cases in equity, must consider the entire case on its merits. (Per *REYNOLDS*, P. J.) *Grandstaff v. Bland*, 41.
3. **Reviewing Evidence: Rules of Decision.** The appellate court, on appeal by a defendant from a judgment rendered on a verdict for the plaintiff, will review the evidence in the light most favorable to the plaintiff. *Lawler v. Vette*, 342.
4. **Conclusiveness of Verdict: Improbable Evidence.** Where there is evidence to support the verdict of a jury, the appellate court has no right to interfere with it on the ground such evidence is improbable. *Logan v. United Railways*, 490.
5. **Conclusiveness of Supreme Court's Decision: Law of Case.** Where the Supreme Court, on a motion to transfer a case, pending on appeal, to the Court of Appeals, held that the motion for a new trial was not filed in time, the Court of Appeals is thereby precluded from reviewing any matters requiring such motion as a prerequisite to review on appeal. *State v. Brisco*, 516.

ATTACHMENT.

1. **Appeals: Rights of Defendant; Section 2335 Construed.** Section 2335, Revised Statutes 1909, which provides for two judgments in attachment suits, one on the issues raised by defendant's plea in abatement, and the other, on the merits of the case, and that, on the trial on the merits, either party may appeal—the plaintiff from the finding on the plea of abatement or on the merits, as he may elect, and the defendant, “if at all, on the whole case”—does not mean that the defendant, on an appeal on the merits, must bring up the attachment proceedings for review, but merely that he may do so, and, if he does not, the matters involved in the trial on the merits are nevertheless reviewable. *Schafer v. Roberts*, 68.
2. **Costs: Landlord and Tenant: Action for Rent: Prevailing Party, Who Is.** Plaintiff brought an action for attachment under section 7896, Revised Statutes 1909, for rent becoming due thereafter. On a plea of abatement, judgment was rendered sustaining the attachment, whereupon defendant pleaded full payment of the rent as it became due, after the commencement of the action, on which plea judgment was rendered for the defendant.
Held, by *NORTONI* and *CAULFIELD*, JJ., that, under section 2263, Revised Statutes 1909, provided that, except when a different provision is made by law, the prevailing party shall recover costs, the costs accruing both before and after the determination of the issue raised by the plea in abatement should be taxed against plaintiff.

ATTACHMENT—Continued.

Held, by REYNOLDS, P. J., dissenting, that the attachment was properly brought and the presumption is, that but for it the rent would not have been paid, and hence that, under section 2275, Revised Statutes 1909, providing that, upon plaintiff dismissing his suit or defendant dismissing the same for want of prosecution, defendant shall recover his costs against plaintiff *and in all other cases it shall be in the discretion of the court to award costs or not*, except in those cases in which a different provision is made by law, it was within the discretion of the trial court to tax against defendant the costs of the attachment which accrued prior to the determination of the plea in abatement; the authority conferred upon the court to thus tax the costs being "a different provision made by law," within section 2263. *Schafer v. Roberts*, 68.

ATTORNEY.

Agreement: Authority. An attorney for defendant has implied authority in the conduct of a trial for his client, to agree that at the close of the evidence he will present a demurrer thereto, which, if sustained by the court, judgment shall be rendered for defendant; but that if the demurrer is refused, the findings and judgment shall be in favor of plaintiff for \$5000, the losing party retaining a right to appeal. *Monk v. Railroad*, 692.

BAILMENTS.

1. **For Mutual Benefit: Liability of Bailee.** Where a bailment is for mutual benefit, the bailee is bound to exercise only ordinary care to keep the property safely and return it when the time of the bailment has expired, and is not responsible for any injury occurring without his fault; but such liability may be enlarged by special contract, even to the extent of securing the bailor against any loss whatever. *Supply Co. v. Commission Co.*, 332.
2. **Same: Contract Extending Liability: Rules of Construction.** Bailees are not presumed to have become liable as insurers, and hence a special contract fixing their liability should not be extended beyond its obvious scope. *Ib.*
3. **Same: Contract Construed.** The hirer of a motor, who, by the contract of hiring, agreed to be responsible for any damage thereto, barring ordinary wear and tear, and to return it in as good condition as when received, was liable for its destruction by fire, in the absence of a showing that the motor itself caused the fire, and hence that this was a peril unavoidably incident to its use, since the parties, by excepting damage from ordinary wear and tear, impliedly indicated that the comprehensive language used should be given full effect as to all other contingencies, and the term "damage" was broad enough to include destruction by fire. *Ib.*
4. **Same: Consideration.** The absence of a special consideration for an agreement by a bailee to be responsible for all damages to the property is immaterial, except as bearing upon the question of intent; the bailment itself being a sufficient consideration for such agreement. *Ib.*

BARBERS.

Conducting School Without Permit: Indictments and Informations: Sufficiency. An information charging accused with conducting a barber's school without obtaining a permit from the State Board of Barber Examiners, in violation of section 1192, Revised Statutes 1909, which charges the offense substantially in the language of the statute, is sufficient. *State v. Brisco*, 516.

BILLS OF EXCEPTIONS.

1. **Time for Filing: Act of 1911.** In a case where the "short record" was filed in the appellate court on February 17, 1911, a bill of exceptions, filed in the trial court on April 8, 1912 (which date was before the date appellant was required by Rule 12 of the St. Louis Court of Appeals to serve his abstract), was filed in time, under the Act of March 13, 1911 (Acts 1911, p. 139), providing that, in any case "now or hereafter" pending on appeal, the bill of exceptions may be allowed and filed at any time before the appellant shall be required by the rules of the appellate court to serve his abstract. *Schafer v. Roberts*, 68.
2. **Time for Filing.** Under section 2029, R. S. 1909 as amended by the Legislature in 1911 (Session Laws of 1911, page 139), the appellant has an unqualified right to have his bill of exceptions signed and allowed at any time before he is required to serve the respondent with his abstract of the record. *O'Dowd v. Railroad*, 660.

BILLS AND NOTES.

Action on Note: Instruction. In an action on a promissory note, the execution of which was denied by defendant under oath, a series of instructions given for plaintiff, epitomized in the opinion, are *held* to correctly declare the law and to be free from containing any undue comments on the evidence. *Klages v. Mueller*, 540.

BUILDING AND LOAN ASSOCIATIONS.

1. **Bonus: Premium: Interest.** The bonus or premium for obtaining a loan from a building and loan association, is a certain and definite sum paid for the loan and is distinct from the rate of interest. It cannot consist of a rate per cent payable indefinitely. *Holmes v. Loan Association*, 719.
2. **Same: Bonus as Per Cent of Loan.** The statute (Sec. 3389, R. S. 1909) providing that a building and loan association may dispense with bids for loans and that such loans may be made to members at such rate of interest and premium as may be provided by by-laws, such premium to be paid in gross installments, does not mean that the premium can be made a per cent of the loan payable monthly during the whole time the money may be unpaid. *Ib.*
3. **Same: Bonus: Per Cent of Principal.** The statute (Sec. 3389, R. S. 1909) in providing that a premium or bonus can be a certain per cent, means a certain per cent of the principal as an ascertained sum, and not a rate per cent during the whole time the loan may remain unpaid. Different provisions of the statute discussed. *Ib.*

BUILDING AND LOAN ASSOCIATIONS—Continued.

4. **Same: Interest: Usury.** A bonus or premium for a loan is not interest, and if, under the name of bonus or premium an additional rate of interest is added, which, together with interest proper, makes a greater per cent than the lawful rate of interest, it will be usury. *Holmes v. Loan Association*, 719.
5. **Same: Second Appeal.** Where an appellate court remands a case to the trial court with directions to ascertain the amount due on the notes and enter a decree of foreclosure for the same, such order did not mean that a decree for plaintiff even if the trial court should find nothing was due. *Ib.*
6. **Same: Res Adjudicata: Second Appeal.** If an appellate court erroneously decides a case, or erroneously states the law, it may in clear cases and to avoid manifest injustice, make a contrary ruling in the same case on a second appeal. *Ib.*

BURDEN OF PROOF. See *Contribution: Equity*, 1, 2; *Life Insurance*, 7; *Sales*, 1.

CARRIERS OF FREIGHT.

1. **Liability for Consequential Damages: Necessity of Notifying Carrier.** A common carrier undertaking to transport goods is not liable for consequential damages arising from loss of profits from the sale of the goods as advertised, by reason of the delay in their transportation, where the shipper does not advise the carrier, at the time the contract of carriage is made, of his intention to transport the goods for the purpose of such sale. *Dunne & Grace v. Railroad*, 372.
2. **Contract for Less than Established Rate: Interstate Commerce.** A shipper is properly required to pay the full freight rate, established under the Interstate Commerce Law (Act February 4, 1887, Chap. 24, Stat. 379; W. S. Comp. St. 1901, p. 3154), although the carrier has, through mistake, contracted to carry at a lower rate. *Ib.*
3. **Overcharge by Connecting Carrier: Liability of Initial Carrier.** Where plaintiff contracted with a defendant railroad company for transportation of a car, to be taken over its line to a certain point and there delivered to a connecting carrier to complete the transportation, and, at destination, the connecting carrier, without having advanced to defendant its charges, collected an excessive amount to cover the freight charges of both, asserting, as to the entire sum, the lien of both, defendant, by reason of the wrongful use by the connecting carrier of the agency which defendant gave it by delivery of the shipment to it without requiring an advancement of the then accrued freight, became liable for the excess collected although it was retained by the connecting carrier. *Ib.*

CARRIERS OF PASSENGERS.

1. **Passenger: Negligence: Degree of Care.** It is not error to refuse an instruction that a carrier of passengers is only required to exercise "all care that was reasonably practicable." It is the duty of such carrier's servants to exercise the utmost care and skill which prudent men use in like business, in similar circumstances. *Richardson v. Railroad*, 162.

CARRIERS OF PASSENGERS—Continued.

2. **Same: Instruction: Evidence.** It is improper that an instruction should single out specific parts of the testimony and direct special attention to them. *Ib.*
3. **Same: Physician: Statement of Pain.** A physician may state complaints made to him by the patient in the course of his examination as to present pain. *Ib.*
4. **Same: Instructions: Non-Direction.** Non-direction, in the way of instructions, in a civil case, is not error. *Ib.*
5. **Injury to Passenger: Contract Against Liability: Pass.** A contract by a carrier of passengers, relieving it from liability for any consequences of its own negligence, is ineffectual for that purpose, even though the passenger with whom the contract was made was carried on its trains on a free pass. *Huckstep v. Railroad*, 330.
6. **Liability for Loss of Passenger's Effects.** A carrier of passenger cannot, by posting a notice that it will not be liable for articles of value kept by passengers in their staterooms, exempt itself from liability for loss from a passenger's stateroom of such articles of necessity and convenience as are usually carried by passengers. *Joy v. Lee*, 526.
7. **Same: Contributory Negligence: Sufficiency of Evidence** In an action against a steamboat company for money lost by a passenger from his stateroom, *held* that the evidence warranted a finding that plaintiff was guilty of contributory negligence, and, therefore, not entitled to recover. *Ib.*
8. **Same: Instructions.** In an action against a steamboat company for money lost by a passenger from his stateroom, where the court charged, that the passenger had a right to retain such a sum of money in his possession in his stateroom as was a reasonable amount for him to carry, taking into consideration his journey, and station in life, notwithstanding the carrier's notice that he would not be liable for the loss of valuables not deposited with the clerk, the refusal of an instruction, defining baggage as such articles of necessity and convenience as a passenger habitually carries, including money and jewelry, was not improper, being covered by the instruction given. *Ib.*

COMMON CARRIERS. See *Carriers of Freight*, 1, 2, 3; *Carriers of Passengers*, 5.

CONTRACTS. See *Ballments*, 2, 3; *Carriers of Freight*, 2; *Carriers of Passengers*, 6; *Principal and Agent*, 3, 4, 5, 6, 7; *Replevin*; *Subrogation*, 3.

1. **Prior Negotiations: Evidence.** Where no fraud appears, all negotiations leading up to the making of a contract are merged in the contract. *Compressed Air Co. v. Fulton*, 11.
2. **Fraud.** Parties to a contract are presumed to know what the contract contains and where they stand on an equality, are bound by its terms, in the absence of fraud. *Cunningham v. Atterbury*, 137.

CONTRACTS—Continued.

3. **Breach: Recovery of Deposit.** Plaintiff sued to recover the amount deposited with a real estate agency as a partial payment of the purchase price of certain real estate under written contract. The vendor acquired the land as the devisee of a citizen of New Hampshire who died intestate. No administration of his estate in this state was procured, and the land in question was therefore subject to the lien of debts of the testator not barred by the administration in New Hampshire. *Held*, that the doubt cast on the title by the fact that debts may be outstanding which may be enforced against the land is a substantial doubt that renders the title unmarketable and justified the rescission of the contract. *Kling v. Realty Co.*, 190.
4. **Execution of: Intention of Parties.** A party, who signs and delivers an instrument, is bound by the obligations he therein assumes, although it is not signed by all the parties named in it, unless it appears that the parties signing mutually intended that it should be inchoate and incomplete and not to take effect as a contract, until signed by all the parties named. *Muehlbach v. Railroad*, 305.
5. **Breach: Penalty.** Where a contract contains provisions for a progressively increasing scale of monthly payments intended to coerce a speedy vacation of a tract of ground and to impose an interminable and ever increasing punishment for a breach of the contract, a punishment so harsh and oppressive, so disproportionate to the subject-matter as to preclude the thought that the parties had in mind the liquidation of reasonable damages in consequence of a breach, such provisions constitute a penalty and are non-enforceable. *Ib.*
6. **Rules for Construction.** The rule that all doubts and ambiguities in a contract should be determined against the party preparing it is not very important and should be resorted to only when all other means of construction fail, especially where the other party signed the contract and caused some changes to be made therein. *Supply Co. v. Commission Co.* 332.
7. **Pleading: Variance.** One suing on a special contract must recover thereon, or not at all, and cannot recover as for money had and received. *Michael v. Kennedy*, 462.
8. **"Contract" and "Agreement" Synonyms.** There is no difference between a "contract" and an "agreement." *Ib.*
9. **Rescission: False Representations.** Plaintiff purchased billiard and pool tables for a given price, part of which was paid in cash and an installment note given for the balance secured by mortgage on the tables. Ten months later plaintiff offered to return the property and demanded the amount already paid because of false representations as to the kind of cushions to be furnished with the tables. Upon the refusal of defendants to take the tables and refund the money, plaintiff brought suit. It is *held*, that upon consideration of all the evidence, plaintiff made no sufficient offer to rescind and no right to rescind existed at the time of the alleged rescission. *Hess v. Ehrlich*, 636.
10. **Family Relation: Instruction.** A married daughter rendered services, such as washing, to her father who lived alone. There

CONTRACTS—Continued.

was evidence tending to show that she did not intend to have him pay for such service. *Held*, that it was proper to instruct the jury that in passing on the question of an implied contract to pay, they had a right to examine the circumstances shown in evidence, including the relationship of the parties. *Johnson v. Johnson*, 732.

11. **Same: Payment to Debtor: Evidence.** Where the evidence showed that a married daughter paid to her father a note of \$338 after her account for services against him was charged to have accrued, it was *held* to be evidence tending to show that she did not intend to charge for such services. *Ib.*
12. **Same: Argument: Practice: Court's Rulings.** It is not proper practice for counsel to state to the jury in his closing argument what the court would have ruled had plaintiff offered herself as a witness. The court's rulings should be announced by the court. *Ib.*

CONTRIBUTION.

Prima Facie Case: Defenses: Burden of Proof. In an action for contribution on a judgment rendered against plaintiff and defendant on a promissory note executed by both of them, plaintiff would make a prima facie case by proving that a judgment was rendered on the note against him and defendant, and that he had paid it in full; and the burden would then rest upon defendant to establish a defense that the note was given for money borrowed by plaintiff alone. *Hespos v. Winkelmeyer*, 532.

CONTRIBUTORY NEGLIGENCE. See *Carriers of Passengers*, 7; *Municipal Corporations*, 1, 2, 3, 6, 7, 12; *Negligence*, 27; *Railroads*, 2; *Street Railways*, 6, 11.

COSTS. See *Attachments*, 2.

Creation. The right to costs is statutory, none existing at common law. *Schafer v. Roberts*. 68.

COURTS. See *Federal Question*.

1. **"Discretion:" Definition.** The definition, that "discretion is a liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable and wholesome, as determined upon the peculiar circumstances of the case and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law" is possibly too broad, since discretion must always be exercised under the law. *Gaar-Scott & Co. v. Nelson*, 51.
2. **Judgments: Courts of Appeals: Res Adjudicata.** Where an issue has been decided by one of the Courts of Appeals, and afterwards is certified to the Supreme Court, under section 6 of Amendments to Constitution (R. S. 1909, p. 101) because of difference of opinion of another of the Courts of Appeals, such decision is not an adjudication of such issue thereafter arising in a case between the same parties. *State ex rel. v. County Court*. 159.

CRIMES AND PUNISHMENTS.

1. **Appellate Practice: Necessity of Filing Motion for New Trial: Record Proper.** In the absence of a motion for a new trial, filed in apt time, and an exception duly saved to its denial, all the proceedings of a criminal trial are closed to examination on appeal, except those shown by the record proper, which, in the case at bar, is *held* to consist of the information, the plea, the submission of the cause to the court, the finding, and the judgment or sentence. *State v. Brisco*, 516.
2. **Appellate Practice: Necessity of Filing Motion for New Trial.** Even if questions involving the construction of the Federal Constitution were within the jurisdiction of the St. Louis Court of Appeals, they could not be reviewed in a criminal case, where they were not presented in the lower court, and preserved for review by the filing of a motion for a new trial. *Ib.*

DAMAGES. See Instruction, 4; Slander of Title, 1; Street Railways, 4.

1. **Personal Injuries: Excessive Recovery.** In an action for personal injuries, where plaintiff sustained a fracture of her right knee cap, resulting in a permanent injury and deformity, a verdict for \$1595 *held*, not excessive. *Roberts v. Piedmont*, 1.
2. **Loss of Profits: Consequential Damages.** Damages arising from loss of profits from a sale of goods, by reason of delay in their transportation, are consequential damages. *Dunne & Grace v. Railroad*, 372.
3. **Personal Injuries: Amount of Recovery.** In an action for personal injuries, where it appeared that, as a result of her injury, plaintiff was compelled to give up her work which paid her twenty-five dollars per week, and that her nervous condition, resulting from her injury, had necessitated her confinement in a hospital for sixteen weeks, at an expense to her of seven dollars and fifty cents per week, *held* that a verdict for \$800 was not excessive. *Logan v. United Railways*, 490.

DEATH BY WRONGFUL ACT.

1. **Death of Railroad Switchman: Interstate Commerce: Federal Employers' Liability Act: Exclusive Remedy.** The Federal Employers' Liability Act (Act Cong. April 22, 1908; Chap. 149, U. S. Stat. at Large, Vol. 35, pp. 65, 66), supersedes the law of the state in so far as the latter covers the same field, and hence the widow of a railroad employee who was killed while engaged in switching cars containing interstate shipments cannot recover for his death under sections 5425, 5427, Revised Statutes of Missouri of 1909. *Rich v. Railroad*, 379.
2. **Death of Railroad Switchman: Interstate Commerce: Federal Employers' Liability Act: Exclusive Remedy.** Where a railroad employee, engaged in interstate commerce, was killed in consequence of a defective car, his widow, though not declaring under the Federal Employers' Liability Act (Act April 22, 1908; Chap. 149, U. S. Stat. at Large, Vol. 35, pp. 65 66), cannot recover for his death under sections 5425, 5427, Revised Statutes of Missouri, of 1909, authorizing an action by a widow for the death of her husband by wrongful act, but a right of action can be maintained only under the Federal act, which requires the the personal representative of the decedent to sue for the benefit of the widow and children. *Ib.*

DIVORCE. See *Life Insurance*, 13.

1. **Motion for Alimony: Appeals and Error.** A motion for alimony *pendente lite* in a divorce proceeding relates to a cause of action that is separate and distinct from the divorce cause, but is incidental thereto, and an order, made on a proper hearing of such motion, is an adjudication of the issues thereby raised, and on the failure of the defeated party to perfect an appeal from such order the adjudication becomes final. *Libbe v. Libbe*, 240.
2. **Alimony: Right of Wife.** Whether guilty or innocent the wife has a right to prosecute or defend an action for divorce, and since the husband usually holds the purse strings he must furnish her with the means of attack or defense, if she is without adequate means of her own, and the fact that she is found to be the guilty party does not deprive her of the right to an appeal and to the means of prosecuting it and to sustain herself during its pendency. *Ib.*
3. **Judgment: Collateral Attack.** Where a motion for alimony, pending an appeal, is overruled and no appeal taken from such judgment, it is error to thereafter sustain a motion to set aside such judgment. *Ib.*
4. **Service by Publication.** In an action for divorce, where service is obtained by publication, the judgment for divorce is not invalid because in the publication the name of the defendant was spelled "Davidson" instead of "Davison." *Davison v. Life Association*, 625.

EQUITY. See *Usury*, 2.

1. **Burden of Proof: Voluntary Disposition of Property: Solvency.** Where in an action in equity to subject shares of stock belonging to the wife, to the payment of a judgment against the husband, it was shown that the husband had made a voluntary disposition of his property, the burden of proof is cast upon him to show that at the time he was solvent and could make such disposition without impairing his ability to pay his debts. *Star v. Penfield*, 302.
2. **Voluntary Conveyance: Fraudulent as to Creditors: Burden of Proof.** A voluntary conveyance is presumptively fraudulent as to existing creditors and the burden of proof is on the donee to repel such presumption and to show that the donor had sufficient means to meet his liabilities. *Ib.*
3. **Jury: Trial by Jury.** In an equity case, it is optional with the trial court to take the opinion of a jury on a question of fact. *Walther v. Cape Girardeau*, 467.
4. **Judgments: Deeds of Trust.** Where a judgment debtor suffers a deed of trust, which is a prior lien, to be foreclosed and takes no steps to protect his interest, in the absence of any fraud in the transaction, equity will not afford relief. *Estes v. Richards*, 585.

ESTOPPEL. See *Fraternal Beneficiary Associations*, 1, 5.

1. **Pleading.** Estoppel, to be available, must be pleaded. *Compressed Air Co. v. Fulton*, 11.

ESTOPPEL—Continued.

2. **Same.** In an action for the purchase price of pumping apparatus, where the answer pleaded a breach of warranty and no reply was filed, the rule that, when a cause is tried on the assumption that a reply is filed, putting in issue the new matter pleaded in the answer, the failure to file a reply may not be urged as error on appeal, is not broad enough to warrant the invocation by plaintiff of an estoppel against defendant to avail itself of the breach of warranty, since estoppel, to be available, must be affirmatively pleaded. *Compressed Air Co. v. Fulton*, 11.

EVIDENCE. See *Admissions*; *Carriers of Passengers*, 2, 7; *Contracts*, 1, 11; *Insurance*, 1; *Local Option*, 1, 2; *Mechanics' Liens*, 1, 2; *Municipal Corporations*, 5; *Negligence*, 16, 17, 24; *Nunc Pro Tunc*, 1; *Payment*; *Pleading*, 2; *Principal and Agent*, 1, 3; *Releases*, 2; *Replevin*; *Sales*, 1, 2, 6, 7, 9, 10, 12, 13; *Slender of Title*, 4; *Statute of Frauds*; *Street Railways*, 3, 7, 9; *Unlawful Detainer*, 4; *Usury*, 3; *Waters and Watercourses*, 2, 4, 5.

1. **Written Contract: Varying Terms: Parol Evidence: Principal and Agent.** Where a contract for the purchase of threshing machinery provided that no person, unless authorized in writing from the seller's home office by an officer thereof, had any authority to add to, abridge or change the warranty contained in the contract, parol evidence was inadmissible to show that the seller's local agent, not so authorized, had waived provisions in the warranty requiring immediate notice to the seller of any breach thereof. *Gaar-Scott & Co. v. Nelson*, 51.
2. **Parol Evidence: Varying or Contradicting Written Contract.** In the absence of fraud, misrepresentation or mistake, parol evidence is not admissible to contradict, vary or enlarge a written contract. *Ib.*
3. **Admission of Attorney: Opening Statement.** Statements made by an attorney at the opening of the trial as to what he expects to prove, do not amount to admissions, they bind no one. *Wasmer v. Railroad*, 215.
4. **Ownership: General Repute: Hearsay.** In an action for the conversion of a carriage, testimony that, according to general reputation, the carriage belonged to plaintiff's husband, was hearsay, and had no tendency to prove that plaintiff did not own the carriage, and hence it was error to admit it. *Strother v. McFarland*, 364.
5. **Reputation.** In an action against a tax collector for the conversion of plaintiff's property in payment of her husband's taxes, it was error to admit evidence that plaintiff and her husband were reputed to be tax dodgers. *Ib.*
6. **Inferences: Suppressing Evidence: Corporations.** Where the secretary of a corporation against which an action was brought refused, upon advice of counsel, to testify concerning correspondence between him and an agent of the company, touching the subject-matter of the suit, it was proper for the trier of the facts to draw an inference therefrom in aid of the establishment of an issue which it was against the interests of the corporation to establish. *Bell v. Insurance Co.*, 390.
7. **Personal Injuries: Possible Causes for Condition.** In an action for personal injuries which were chiefly of a nervous character,

EVIDENCE—Continued

the exclusion of evidence, that plaintiff had separated from her husband on account of his habits of drink, was harmless, although plaintiff's physician had testified that such a separation might have affected her nervous condition, inasmuch as there was no showing or offer to show when the separation occurred nor how long it continued and hence nothing to connect it with the nervous condition for which damages were sought. *Logan v. United Railways*, 490.

3. **Presumption: Continuance of Status Quo.** When a state of facts is once shown to exist, it is presumed to continue until the contrary is shown. *Dehner v. Miller*, 504.

FEDERAL EMPLOYERS' LIABILITY ACT. See **Death by Wrongful Act**, 1, 2; **Interstate Commerce**.

FEDERAL QUESTION.

Interstate Commerce: Controlling Effect of Federal Decisions: Courts. A decision of the United States Supreme Court, construing a Federal statute regulating interstate commerce, is controlling on state courts. *Rich v. Railroad*, 379.

FIRE INSURANCE. See **Insurance**, 5.

FRATERNAL BENEFICIARY ASSOCIATIONS.

1. **Physician as Agent: Application: Estoppel: Concealment.** Where a fraternal benefit association's examining physician takes the application of a member for a benefit certificate of insurance and himself writes down some of the answers and omits others on the ground that they are unimportant, the acts of the physician are the acts of the company, and it will not be allowed to say that there was a warranty that the application contained full and complete answers to the questions propounded therein, provided, that the applicant, in fact, made true answers as asked; and whether he did or not, there being evidence pro and con, was a question for the jury. *Floyd v. Modern Woodmen*, 166.
2. **Forfeiture: Waiver.** Prompt payment of dues and assessments may be waived by a course of dealing with the insured, notwithstanding the certificate provides that no waiver of forfeiture shall be valid unless in writing signed by an officer of the association. *Godwin v. K. L. of S.*, 289.
3. **Invalid By-Law.** The provision of a by-law of a fraternal beneficiary association that "the receipt and retention of unpaid delinquent dues and assessments in case a suspended member is not in good health shall not have the effect of reinstating such member or entitling him or his beneficiary to any right under his certificate" is invalid. *Ib.*
4. **Waiver.** The act of a fraternal beneficiary association in receiving and retaining a member's dues and assessments after the appointed time for payment and without protest until after the death of the member, is a waiver of the cause for forfeiture. *Ib.*

FRATERNAL BENEFICIARY ASSOCIATIONS—Continued

5. **Estoppel.** A fraternal beneficiary association is estopped from declaring a forfeiture, for non-payment of dues and assessments within the time provided, by its manner of doing business in receiving the delinquent assessments of its members and treating them as reinstated members of its order. *Godwin v. K. L. of S.*, 289.

FRAUD. See **Contracts**, 2.

GIFTS. See **Husband and Wife**.

Inter Vivos: Delivery of Possession. In order to constitute a gift *inter vivos*, delivery of possession is necessary. *Strother v. McFarland*, 364.

HARMLESS ERROR. See **Appeal and Error**, 1, 2.

HUMANITARIAN DOCTRINE. See **Negligence**, 5, 6, 7, 26, 27, 28; **Railroads**, 5; **Street Railways**, 6, 7, 8, 9, 10, 11.

1. **Discovery of Peril.** The beneficent principle of the humanitarian doctrine does not take into consideration the origin of the peril of the plaintiff which culminated in his injury, but whether he was careful or negligent requires of the operator of the car the exercise of reasonable care to discover the peril and avoid the threatened injury. *Flynn v. Railroad*, 182.
2. **Two Principal Tests.** In cases involving the humanitarian rule there are two principal tests: First, was the plaintiff in danger of which he did not become aware until too late to save himself and, second, was his peril obvious to a reasonably careful man in the position of the motorman at the time when the latter had a reasonable opportunity to prevent the injury? *Ib.*

HUSBAND AND WIFE. See **Wills**, 2, 3, 4.

Gifts: Delivery of Possession. Where, during coverture, the husband purchases an article for his wife and delivery is made at their home, jointly occupied by them, such delivery is one of possession to the wife, sufficient to constitute a valid gift. *Strother v. McFarland*, 364.

IDEM SONANS. See **Life Insurance**, 13.

1. **Identical Sound.** Where the name as spelled, though incorrect, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the correct name, as commonly pronounced, the name thus given is a sufficient designation. *Davison v. Life Association*, 625.
2. **Same.** It matters not how two names are spelled, what their orthography is; they are *idem sonans* within the meaning of the books if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long continued usage has by corruption or abbreviation made them identical in pronunciation. *Ib.*

IMPLIED CONTRACT. See **Contracts**, 10, 11, 12.

INDICTMENTS AND INFORMATIONS. See **Barbers**.

INJUNCTIONS. See Appellate Practice, 2; Water and Water-courses, 4, 5.

1. **Mandatory Injunctions: Character of Proof Required.** In an action for a mandatory injunction, the court will not grant the relief unless the evidence clearly establishes the essential allegations of the petition; the burden of proof being on the plaintiff. [Per REYNOLDS, P. J.] *Grandstaff v. Bland*, 41.
2. **Mandatory Injunction: Municipal Corporations: Compelling Undoing of Illegal Acts.** A mandatory injunction lies to compel a city to restore a lot to its former condition, after having improperly taken forcible possession of the same and constructed a sewer drain through it, over the owner's protest, and in the face of notice that proceedings would be taken as promptly as possible to enjoin such action. *Walther v. Cape Girardeau*, 467.
3. **Same: Adequate Remedy at Law.** Where a city wrongfully constructed a drain across plaintiff's lot, over his protest and in the face of notice that proceedings would be taken as soon as possible to enjoin such construction, his right to mandatory injunction to compel restoration of the lot to its former condition could not be defeated on the theory that he had an adequate remedy in an action for damages. *Ib.*
4. **Mandatory Injunction: Municipal Corporations: Compelling Undoing of Illegal Act: Right of Trial by Jury.** While, in an action at law, an issue as to the existence of nuisance is properly submitted to the jury as one of fact, it was not improper, in a proceeding for a mandatory injunction to compel a city to restore a lot to the condition in which it was before the city took forcible possession of it and constructed a drain across it, to refuse to submit to the jury issues as to whether plaintiff was liable for the maintenance of a nuisance and whether defendant had a right to abate it as it undertook to do. *Ib.*

INSTRUCTIONS. See Appeal and Error, 1, 10; Bills and Notes; Carriers of Passengers, 2, 4, 8; Contracts, 10, 11, 12; Insurance, 2, 3; Municipal Corporations, 4, 6, 9, 13; Negligence, 1, 19, 40, 41; Principal and Surety, 5; Railroads, 1, 2, 4; Sales, 10, 14; Street Railways, 4, 8, 9, 12; Witnesses, 8, 9.

1. **Abstract Instructions.** An instruction though correct as an abstract proposition, is properly refused, if it fails to apply the rules of law it announces to the facts of the case. *Roberts v. Piedmont*, 1.
2. **Form: Failure to Require that Facts be Found "From the Evidence."** An instruction containing the phrase "that if the jury found the facts," was not erroneous for omitting to add the words "from the evidence," since it was not possible for the jury to fail to understand that all the facts found must be from the evidence. *Compressed Air Co. v. Fulton*, 11.
3. **Defining Negligence.** The rule that the term negligence must be defined in instructions to the jury does not refer so much to a mere law dictionary definition as to a definition by the statement of facts or acts from which the inference of negligence would have to be implied. *Mather v. Railroad*, 142.

INSTRUCTIONS—Continued.

4. **Damages: Maximum to be Recovered.** An instruction which, in effect, told the jury that the maximum of the damages plaintiff could recover under the petition, would be a reasonable assessment of damages, is not erroneous under the ruling in *Stid v. Railway*, 236 Mo. 382. *Flynn v. Railroad*, 182.
5. **Not Supported by Evidence: Imputing Bad Faith.** Where, in an action against a tax collector for conversion of a wife's property for her husband's taxes, there was no evidence that the husband was claiming that she was the owner of the property in question or had any motive for so claiming, it was error to instruct that the jury could consider the motive which prompted the husband to claim that the property had been given to plaintiff, and whether the deal was in fact a *bona fide* gift or one merely in name, to prevent the payment of taxes. *Strother v. McFarland*, 364.
6. **Same.** Instructions suggesting an imputation of bad faith in a party's conduct are always improper unless warranted by the evidence. *Ib.*
7. **Refusal: Abstract Instruction.** It is not error to refuse an instruction which is not applicable to the issues, although it is abstractly correct. *Dolding v. St. Charles*, 403.
8. **Same: Covered by Instructions.** It is not error to refuse an instruction, the subject-matter of which is covered by another instruction which is given. *Ib.*
9. **Trial Before Court: Function of Instructions.** Where the trial is before the court, declarations of law are only of service as indicating the theory upon which the court tried the case. *Board of Education v. Fidelity & Guaranty Co.*, 410.
10. **Refusal: Covered by Other Instructions.** Where a requested instruction is covered, so far as correct, by another given, there is no error in refusing it. *Edwards v. Railroad*, 428.
11. **Construction: Entire Charge Considered.** In determining whether or not an instruction is correct, it should be read in connection with the other instructions given. *Dehner v. Miller*, 504.
12. **Refusal: Covered by Other Instructions.** It is not error to refuse an instruction which is covered by other instructions given. *Joy v. Lee*, 526.
13. **Commentary on Evidence.** In an action on a promissory note, the execution of which was denied by defendant under oath, the court instructed the jury that, in determining whether or not the signature was genuine, they were not bound to consider the testimony of defendant on that issue as controlling or conclusive, but they should consider her testimony in connection with all the other testimony bearing on the matter, and if, from all the facts and circumstances in evidence, they were reasonably satisfied that defendant signed the note, they should find for plaintiff. *Held*, that the instruction correctly declares the law and is not objectionable as unduly commenting on the evidence. *Klages v. Mueller*, 540.

INSTRUCTIONS—Continued.

14. **Same.** In an action on a promissory note, the execution of which was denied by defendant under oath, where plaintiff's testimony was given by deposition, the court instructed the jury "that certified copies of public records are entitled to the same consideration as the records themselves and that depositions read in evidence are to be considered and given the same weight as statements made by witnesses therein as if they had personally appeared at the trial and testified in accordance with the deposition." *Held*, that the instruction correctly declares the law and is not objectionable as unduly commenting on the evidence. *Ib*.
15. **Construed as a Whole.** It is not proper to disjoint an instruction and construe it with reference to the separate parts, but it should be considered as one. *Turley v. Street Railway*, 655.
16. **Technical Objections.** The objection to an instruction that it required the defendant to maintain a lookout for the plaintiff instead of requiring the exercise of ordinary care, is purely technical. *Vanneman v. Laundry Co.*, 685.

INSURANCE. See *Municipal Corporations*, 8, 9.

1. **Accident Policy: Evidence: Res Gestae.** Where in an action on an accident policy it appeared that a man was stricken with apoplexy in a street car, from which death ensued, and the question was whether the apoplexy was caused naturally or by a fall in the aisle of the car, it was shown that he was assisted out of the car and carried to his house nearby and laid on a couch; his arm was bruised and pained him. The court refused to permit a witness for the plaintiff to testify as a part of the *res gestae*, that after he was put on the couch and within thirty minutes after being stricken, he stated that he fell in the car and hurt his arm. *Held*, not error. *Hooper v. Insurance Co.*, 209.
2. **Same: Disease: Accident: Direct Cause: Instructions.** Even though one is so diseased that death will shortly ensue, yet if the immediate cause of his death is an accident, and though he would not have died but for his diseased condition, liability on an accident policy of insurance is incurred. And instructions for the defendant which practically cut off such consideration by the jury are erroneous. *Ib*.
3. **Same: Instructions: Motion for New Trial: General Statement of Error.** If several instructions are given for a defendant and exception taken to giving a part of them, it is sufficient to allege, generally, in the motion for new trial, that "The court erred in giving erroneous and improper instructions," without designating specifically which ones are erroneous. *Ib*.
4. **Indemnity for Accidents: Waiver.** Where the insurer or its agent who takes the insurance knows of the existence of a ground of forfeiture provided in the policy and with such knowledge delivers the policy and collects the premium, the ground of forfeiture is waived. *Scarritt Estate v. Casualty Co.*, 567.
5. **Concealment of Facts: Question of Jury.** Plaintiff sued on a policy of fire insurance issued by defendant to cover a dwelling, but the building was used as a candy factory. The defendant's

INSURANCE—Continued.

agent inspected the building before the policy was issued. The plaintiff, a non-resident of the state, was unaware that it was used for a candy factory. Defendant did not insure buildings used for factory purposes and charged plaintiff with deceitful concealment of fact to obtain the policy. *Held*, that under the evidence the issue of fraudulent concealment was one for the jury to solve.. *Bailey v. Insurance Co.*, 593.

INTERSTATE COMMERCE. See *Carriers of Freight*, 2; *Death by Wrongful Act*, 1, 2; *Federal Question*, 1.

Who Engaged In: Railroad Switchman: Federal Employers' Liability Act. A switchman, engaged in switching, in a railroad division yards in this state, a car loaded with freight and in transit from this state to another state, is engaged in interstate commerce, within the Federal Employers' Liability Act (Act Cong. April 22, 1908; Chap. 149, U. S. Stat. at Large, Vol. 35, pp. 65, 66). *Rich v. Railroad*, 379.

JUDGMENTS. See *Courts*, 2; *Divorce*, 3; *Equity*, 4; *Res Adjudicata*; *Nunc Pro Tunc*.

1. **Default: Motion to Set Aside.** A motion to set aside a final judgment must be considered a petition for review falling within the operation of Sec. 2104, R. S. 1909. *Icing Co. v. Kemper*, 613.
2. **Same.** The statute allows a motion to set aside a default before final judgment, but not after. *Ib.*
3. **Same.** A party in default may obtain relief against a judgment even after it is final if he has good grounds and adopts the proper procedure; namely that prescribed by Sec. 2104, R. S. 1909. *Ib.*
4. **Same.** Where the petition for review is not verified and fails to show a meritorious defense to the action or the exercise of due diligence to prevent a default, it should be denied. *Ib.*
5. **Verity: Judge's Docket: Clerk's Minutes.** The recorded judgment of a court of record imports absolute verity unless contradicted by other parts of the record. And such judgment may properly recite agreements of parties not contradicted by the judge's docket or the clerk's minutes, though such agreements are not mentioned in such docket or minutes. *Monk v. Railroad*, 692.
6. **Appellate Court: Assumption: Remedy.** If a recorded judgment of the trial court recites an agreement of the parties which is made by the attorneys in the cause, an appellate court will assume that the court found the attorneys had authority to make the agreement. An appellate court cannot inquire into the authority of such attorneys. The proper remedy is by proper proceedings in the proper court against the judgment. *Ib.*

JURISDICTION. See *Appeal and Error*, 20.

Courts of Appeals: Construction of Federal Constitution. The determination of questions involving the construction of the Federal Constitution is not within the jurisdiction of the St. Louis

JURISDICTION—Continued.

Court of Appeals, under section 12, article 6 of the Constitution of Missouri, as amended by section 5 of the Constitutional Amendment of 1884. *State v. Brisco*, 516.

JURY.

Remarks of Judge. The court has no right to address the jury orally as to their duty. The law contemplates that when the jury have heard the evidence and have been instructed as to the law, they understand the nature of their duty. *State v. Campbell*, 589.

LACHES. See *Appeal and Error*, 15.

LANDLORD AND TENANT. See *Attachment*, 2; *Slander of Title*, 2, 5; *Unlawful Detainer*, 1, 3.

Attachment for Rent: Merchants. Section 7896, Revised Statutes 1909, authorizing an attachment against a tenant for rent, if he is intending to remove, is removing, or has removed, property from the leased or rented premises, is applicable to a tenant who is carrying on business as a merchant and selling his stock from day to day. *Schafer v. Roberts*, 68.

LICENSES.

Parol License to Use Real Property: Irrevocable Interest. One making a cut and constructing a levee across the corner of a tract of land owned by another, pursuant to permission given by him and with his assistance, became a purchaser for a valuable consideration, and the landowner could not thereafter revoke the license. [*NORTON* and *CAULFIELD*, JJ., concurring.] *Grandstaff v. Bland*, 41.

LIFE INSURANCE. See *Waiver*.

1. **Assessment Company: Forfeiture: Illegal Assessments.** The policy issued to a member by an assessment company cannot be declared forfeited by reason of the failure of the member to pay assessments illegally levied. The right to assess is strictly construed and it can only be exercised when the conditions prescribed in the contract exist. *Wayland v. Indemnity Co.*, 221.
2. **Abandonment of Policy: Intention.** The test of an abandonment of rights under a life insurance policy is the existence of an intent to abandon and the presumption is that the owner of property intends to preserve his rights. *Ib.*
3. **Unlawful Assessments: Forfeiture.** Plaintiff was named as one of the beneficiaries in a policy issued to one Wayland who failed to pay two assessments levied in October, 1905. Thereupon his membership was declared forfeited and he made no effort to be reinstated. No notice of any subsequent assessments was given him, and in October, 1908, he died. The interest of the other beneficiaries was assigned to plaintiff. The unpaid assessments were made when unnecessary under the provisions of the contract and therefore were illegal and void, furnishing no legal basis for a forfeiture. *Ib.*

LIFE INSURANCE—Continued.

4. **Forfeiture: Subsequent Assessments.** The attempted exaction of illegal assessments and the declaration of the insurer that it would not continue in contractual relations with the assured except on his submission constituted a breach of the contract that relieved the assured of the obligation to pay or tender payment of subsequent lawful assessments. *Wayland v. Indemnity Co.*, 221.
5. **Illegal Assessments: Abandonment.** An assessment policy was issued to the assured in 1888, and he paid all assessments until May, 1902, when he failed to pay the one levied at that time, or any subsequent ones. He died in 1907. The unpaid assessment was illegal because it was levied to pay losses, which could be paid out of funds in the hands of the insurer, or under its control, applicable to the payment of such losses. *Held*, that the policy was not forfeited by the failure to pay such illegal assessment. *Johnson v. Insurance Co.*, 261.
6. **Same.** A certificate holder in an assessment company cannot be put in the wrong and subjected to the penalty of forfeiture until he neglects or rejects a lawful demand, and, if the assessment in question was illegal, the insurer is without legal justification in refusing to pay the loss. *Ib.*
7. **Same: Burden of Proof.** Where the policy holder was in good standing up to the time he defaulted in the payment of an assessment, the burden is on the insurer to show affirmatively the existence of facts on which it predicates its right to declare a forfeiture and to prove that the assessment was necessary, was not excessive, and was levied in the manner prescribed in the contract. *Ib.*
8. **Abandonment.** Where a certificate holder in an assessment company fails to pay an assessment, illegally levied, within the period provided for payment and thereafter has no further communication with the insurer, his silence cannot be tortured into acquiescence in the forfeiture of his policy. *Ib.*
9. **Delivery of Policy: Validity of Provisions.** A provision in a life insurance policy, that it shall not take effect unless the premium is paid and the policy is delivered to and accepted by the insured during his lifetime and in good health, is valid. *Bell v. Insurance Co.*, 390.
10. **Same: Waiver.** A provision in a life insurance policy, that it shall not take effect unless the premium is paid and the policy is delivered to and accepted by the insured during his lifetime and in good health, being for the benefit of the insurer, may be waived by it or its authorized agent. *Ib.*
11. **Same: Acts Constituting Delivery.** Where insured paid his full first premium on a life insurance policy in advance and directed the soliciting agent to deposit the policy in the agent's safe with insured's other private papers his act in acquiescing in the policy being deposited in the safe, upon being informed of its receipt by the agent, was a sufficient acceptance of it, under a provision that it should not be effective until delivered to and accepted by the insured while in good health; and this is true although he was not in good health at the time, if the insurer waived so much of the provision as required the delivery to be made while he was in good health. *Ib.*

LIFE INSURANCE—Continued.

12. **Same: Waiver by Agent: Ratification.** Where the soliciting agent of a life insurance company, who had authority to collect premiums and deliver policies, collected a premium in advance and transmitted it to the company, and, upon receipt of the policy from the company, delivered it to insured, knowing at the time that he had received injuries two days before, such delivery would be a waiver of a provision in the policy that it should not take effect unless delivered to insured while in good health, if the agent had authority to waive; and although he had no such authority, yet where the company, after receiving proofs of death, showing that insured met with the injury that caused his death before the policy could have been delivered by the agent, delayed several months before offering to return the premium, and during all of such time had knowledge of the fact that insured was not in good health at the time the policy was delivered, it ratified the waiver of the agent. *Ib.*
13. **Mutual: Divorce: Beneficiary: Idems Sonans.** Two certificates of membership in a Mutual Life Insurance Association named the wife of the insured, Tillie Davison, as the beneficiary. Upon the death of the member, his former wife, Caroline Davison, from whom he had obtained a divorce, sought to recover the proceeds of the certificates upon the ground that the divorce was illegal, because in the publication of service her name was spelled "Davidson" instead of "Davison," and that therefore she was the wife of the insured at the time of his death. *Held*, that "Davidson" and "Davison" are idem sonans, the judgment for divorce valid, and the widow, Tillie Davison, entitled to the proceeds of the certificate. *Davison v. Life Association*, 625.

LOCAL OPTION.

1. **Evidence: Impeaching Witness: Cross-Examination.** It is error to refuse to allow a witness to answer questions pertaining to his conviction of criminal offenses. *State v. Campbell*, 589.
2. **Same: Criminal Offenses: Include Misdemeanors.** The term criminal offense, as used in Sec. 6383, R. S. 1909, has been construed to include misdemeanors. *Ib.*
3. **County Courts.** The proceedings to procure an election to vote on the adoption of the Local Option Law were begun in the County Court of Randolph County, at Moberly by petition, and an election ordered. Afterwards, at Huntsville, the county court appointed the judges to hold such election. *Held*, that City. *Act of the Legislature* (1885, sec. 6) providing for character) on terms of the county court at Moberly, the Local the consent of has not legally adopted. *State v. Eubanks*, 681.
11. **the part of**
12. **the title**

Real Estate. A marketable title is one which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would in the exercise of that prudence which business men ordinarily bring to bear upon such transactions be willing to accept. *Kling v. Realty Co.*, 190.

MASTER AND SERVANT. See *Negligence*, 23, 29, 38, 39.

MECHANICS' LIENS.

Pleading: Evidence. Where a petition charges that material was furnished at the joint request of a realty company and three individuals, it is not permissible to prove that one of the individuals, who acted for the realty company, was an undisclosed agent of said company. *Coen v. Bettman*, 671.

2. **Same.** Where a petition in an action to enforce a mechanic's lien, charges a joint contract, recovery must be upon that theory or not at all, notwithstanding the evidence may disclose a right to recover upon some other cause of action not pleaded. *Ib.*
3. **Pleading: Joint Contract.** The allegations of a petition that materials were furnished at the instance and request of a company and three individuals does not necessarily amount to an allegation of a joint contract, but is subject to the construction that the acts charged were separate and not joint. *Ib.*

MONEY HAD AND RECEIVED.

Necessity of Showing Defendant's Receipt of Money: Principal and Agent. The agent of a real estate broker, who negotiated, on behalf of his principal, a sale of land, was not liable to the purchaser for a part of the purchase price which the latter paid directly to the broker, in an action for money had and received, although the deed delivered to the purchaser was a forgery, since defendant would be liable in that form of action only in the event he had received the amount sued for, or his principal had received it for him or for their joint benefit. *Lang v. Friedman*, 354.

MUNICIPAL CORPORATIONS. See Injunctions, 2, 3; Negligence, 1; Waters and Watercourses, 7.

1. **Defective Street: Injury to Pedestrian: Contributory Negligence.** In an action against a city for injuries received by plaintiff while walking along a street, by reason of defects therein, *held* that plaintiff was not chargeable with knowledge of the condition of the street merely because she had formerly lived in the city and, in a general way, knew about the streets, where she testified positively that she did not know of the particular defect that caused her injury. *Roberts v. Piedmont*, 1.
2. **Same.** A pedestrian injured by a defect in a street in the night-time is not chargeable with contributory negligence on the theory he chose a dangerous way when a safe way was available to him where he had no knowledge of the defect or the policy he chose was the more dangerous one. *Ib.* During his lifetime the insurer, may
3. **Same: Pleading: Sufficiency of Petition: Variance.** Petition against a city for injuries received by plaintiff while walking along a street, by reason of defects therein, *held* that the petition was sufficient as against a demurrer *ore tenus*; *held, further*, that there was no variance between the *allegata* and *probata*. *Ib.*
4. **Defective Street: Injury to Pedestrian: Instruction.** In an action against a city for injuries received by plaintiff while walking along a street, by reason of defects therein, *held* that the instructions given for plaintiff are not subject to criticism. *Ib.*

MUNICIPAL CORPORATIONS—Continued.

5. **Same: Sufficiency of Evidence.** In an action against a city for injuries received by plaintiff while walking along a street, by reason of defects therein, *held*, under the evidence, that it was proper to submit the case to the jury. *Ib.*
6. **Defects in Street: Injury to Pedestrians: Contributory Negligence: Instructions.** An instruction, in an action against a city for injuries to a pedestrian on a defective street, that it was the duty of the pedestrian, using the streets at night, to travel only over known and safe streets, and if she voluntarily undertook to use an unknown road, beset with danger, and was injured thereby, there could be no recovery, was properly refused, because omitting any reference to the fact of her knowledge of any danger in the route she selected. *Ib.*
7. **Contracts: Validity.** Under section 2778, Revised Statutes 1909, providing that all contracts by cities shall be in writing, there can be no recovery for labor and material furnished to a city, in the absence of a written contract or memorandum. *Compressed Air Co. v. Fulton*, 11.
8. **Excavations: Lights: Insurance: Duty.** It is the duty of those making excavations in the streets of Kansas City, on quitting work in the evening to provide properly secured lights of warning of danger to pedestrians or those driving along the streets. But such duty does not extend to a condition of insurance, and therefore there is no obligation to see that the lights are kept in place all night. *Pyburn v. Kansas City*, 150.
9. **Same: Instructions: Contradictory.** If an instruction is given for a plaintiff who drives into an excavation in the street, that it was the duty of a city and contractor who had excavated in the street, to see that the light was burning at the time plaintiff drove into it, it is prejudicial error which is not cured by a correct instruction given for defendants. *Ib.*
10. **Injury to Pedestrian: Defective Sidewalk: City's Constructive Knowledge of Defect.** *Held*, that an open and obvious hole in a sidewalk, which had existed for more than a year before it caused an injury to a pedestrian could have been discovered by the city's officers, by the exercise of due care, in time to have repaired it before the injury was sustained. *Dolding v. St. Charles*, 403.
11. **Same: Sidewalk Constructed by Property Owners Liability of City.** The construction of a sidewalk (although of a primitive character) on a public street by abutting property owners, with the consent of the city, constitutes an invitation to the public, on the part of the city, to use the sidewalk, and an assurance that the city will exercise ordinary care to maintain it in a reasonably safe condition, which invitation and assurance continue until it is entirely removed; and hence, in an action for injuries from a defect in such a sidewalk, the direction of a verdict for the city, on the theory that the sidewalk was so defective that the public were not justified in using it, was properly denied. *Ib.*
12. **Same: Contributory Negligence: Question for Jury.** In an action against a city for injuries sustained on a defective sidewalk, where the evidence showed that plaintiff had no knowledge of the defects, that she was injured during the night, and that

MUNICIPAL CORPORATIONS—Continued.

there were no street lights to aid her observation, the question of her contributory negligence was for the jury. *Dolding v. St. Charles*, 403.

13. **Same: Instructions.** In an action for injuries caused by a defective sidewalk, the refusal of an instruction that, although private citizens had laid a footway along the street, that did not make it the duty of the city to renew and replace it with another one of like material, when the first became decayed or was worn out; that failure to reconstruct or replace it with another one was not negligence; and that the city performed its full duty by keeping the street in a reasonably safe condition for travel, was not prejudicial error, as the court charged in other instructions that the city performed its full duty by keeping the street in a reasonably safe condition, and there was no claim that the city was required to replace the sidewalk with a new one, but merely a claim that it was its duty to maintain the sidewalk which was there in a reasonably safe condition. *Ib.*
14. **Nuisances: Manner of Abatement.** While municipalities may declare what constitutes a nuisance and may summarily abate the same, such abatement must be done in a lawful manner, and is subject to determination by the courts, both as to the fact of nuisance and as to the manner in which the abatement is carried out; and the power to abate does not carry with it the power to destroy, unless the thing abated be a nuisance *per se* and of a public character. *Walther v. Cape Girardeau*, 467.
15. **Same.** If a nuisance on private property can be abated in any other way than by forcibly taking possession of the property, it is the duty of a city, undertaking to abate the nuisance, to do so. *Ib.*
16. **Trespass of Agents: Individual Liability.** The agents of a municipal corporation who, without authority of law, enter upon land and lay a drain over it, commit a trespass and lay themselves liable to the owner for damages, compensatory and penal. *Ib.*
17. **Nuisances: Manner of Abatement: Sewers: Eminent Domain.** A municipal corporation has no right to summarily take possession of a strip of land for the purpose of constructing a drain across it and thereby abate a nuisance located on other land; but it has the power to obtain land by condemnation, for the construction of sewers. *Ib.*
18. **Same: Right to Abate: Question of Fact.** The question as to the right of a city to abate a thing claimed to be a nuisance is one of law and not of fact. *Ib.*
19. **Abating Nuisance: Wrongful Act: Reimbursement for Expenses.** A city is not entitled to recover against a property owner the cost of constructing a drain across his lot, where, in taking possession of the lot and in constructing the drain, it committed a trespass. *Ib.*

MUNICIPAL OFFENSE.

Reasonable Doubt: Malum In se. In prosecutions by a city under a municipal ordinance for an offense which is *malum in se*, the defendant is entitled to an instruction requiring the jury to give him the benefit of a reasonable doubt. *Stanberry v. O'Neal* 709.

NEGLIGENCE. See **Carriers of Passengers**, 1, 2; **Pleading**, 2; **Railroads**, 3, 4, 6.

1. **Instructions: Submitting Different Degrees of Care: Municipal Corporations.** An instruction, in an action against a city for injuries to a pedestrian on a defective street, that if the pedestrian knew of the existence of the defect, or by ordinary care might have known of it, it was her duty, while traveling on a dark night, to use a great degree of care to avoid the defect, and that if she had exercised due care she would have prevented the accident, then she was not entitled to recover, was properly refused, because contradictory and confusing, as it informed the jury it was plaintiff's duty to exercise two different degrees of care, viz.: "great care" and "due care," without defining either term. *Roberts v. Piedmont*, 1.
2. **Degrees of Care.** "Great care" and "due care" are entirely different matters. *Ib.*
3. **Transfer Privileges: Ordinance.** An ordinance requiring a street car company to furnish transfers that will enable passengers to go by a reasonably direct route to their destinations does not deprive the company of its right as a common carrier to make reasonable rules controlling the use of transfer privileges. *Duke v. Railroad*, 121.
4. **Transfers: Duty of Passengers.** It is the duty of a street railway to prescribe reasonable rules for the use of transfers and when passengers receive transfers they must inform themselves of the manner in which they can be used. If they make a mistake, not induced by the agents of the company, they have no remedy. *Ib.*
5. **Street Railways: Collision with Vehicle: Humanitarian Rule.** Plaintiff sued for damages for injuries received when the buggy in which he was riding was struck in the rear by an electric propelled street car. He was driving west and had just turned onto the street car track to go around a wagon ahead when someone warned him of the rapid approach of a west bound car. He then turned to get off the track when the car struck the rear axle of his buggy, and he was thrown out. No bell was sounded or attempt made to check the speed of the car before the collision. *Held*, that the conduct of the motorman as depicted in the evidence clearly was negligent under the humanitarian rule. *Mather v. Railroad*, 142.
6. **Humanitarian Rule: Excessive Speed: Pleading.** The allegation of the two acts of negligence in the petition, viz., excessive speed and negligence under the humanitarian rule do not make the pleading bad, on the ground that they are so inconsistent that each destroys the other. Such acts may be alleged in the same petition (*Gaedis v. Railway*, 161 Mo. App. 225). *Flynn v. Railroad*, 182.
7. **"Last Chance:" Sole Cause.** Where a clear case of "last chance" negligence is presented, such negligence occupies the whole field of culpability and must be considered as the sole producing cause of the injury. *Ib.*
8. **Derailment.** Plaintiff sued for damages for injuries caused by an electric car leaving the rails and running into his horse and wagon and throwing them against him. He conducted a feed

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store and was in the act of putting a bale of hay into his wagon which was standing in front of his store when the accident occurred. *Held*, that the demurrer to the evidence was properly overruled. *Kalver v. Railroad*, 198.

9. **Proximate Cause.** The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event and without which it would not have happened. *Ib.*
10. **Injured at Crossing.** Plaintiff sued for damages for injuries to his wife who was struck by a train when she was crossing the railroad track, where it intersected a public street. Under the facts and circumstances shown in evidence, it is held that plaintiff could not recover. *Wasmer v. Railroad*, 215.
11. **Public Crossing: Unlawful Rate of Speed.** A pedestrian, who, while in a place of safety at a public street crossing, looked and saw a train approaching at thirty or thirty-five miles an hour, but took the chances and attempted to cross in front of it, is not entitled to recover, notwithstanding the train was running at an unlawful rate of speed. *Ib.*
12. **Automobiles.** Plaintiff, a girl six years old, while in a public street with a large crowd of adults and children at the scene of a collision between a street car and an automobile, was struck down and run over by an automobile which was driven at a dangerous rate of speed through the crowd which opened a way for said automobile. The rear wheel ran over and broke her leg near the hip. *Held*, that the evidence, as a whole, was sufficient to warrant the submission of the case to the jury. *Haake v. Davis*, 249.
13. **Injured at Crossing: Failure to Whistle for Crossing.** Plaintiff sued for damages for injuries received by a collision of his wagon with a locomotive while driving a team of horses hitched to said wagon, on a public wagon road over a crossing of defendant. He stopped, looked and listened before going over the crossing, but neither he nor his companions who were riding in the wagon with him could see or hear any train approaching, and no whistle was sounded. The train was running light down grade with so little noise that an attentive person in plaintiff's situation could not hear it and because of obstructions to vision could not see it. *Held*, that the demurrer to the evidence was properly overruled. *Brown v. Railroad*, 255.
14. **Statute: Crossing Signals.** Section 3140, Revised Statutes 1909, imposes the duty on railroads to signal for crossing and a failure to give such signals is *per se* negligence. *Ib.*
15. **Personal Injuries: Ordinances.** Plaintiff, a boy over twelve years of age, sued for damages for injuries sustained as the result of falling in an excavation. He was riding a bicycle along a path used by pedestrians on a street without paving or sidewalk and his wheel was deflected and he fell into an excavation that extended about ten feet into the street. There was an ordinance in force at the time making it unlawful for any person over the age of twelve years to ride a bicycle on any walk, by-way or path used as a public way for pedestrians. *Held*, that plaintiff was a trespasser and not entitled to recover. *Williams v. St. Joseph*, 299.

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16. **Evidence: Injured on Sidewalk.** In an action for personal injuries it is reversible error to permit plaintiff to prove the number and ages of the members of his family, unless such evidence is pertinent to one of the issues contested by the parties. *Kingsley v. Kansas City*, 544.
17. **Same: Condition of Health.** Where it is contended that the condition of plaintiff's health was not due to her injury but to the congenital imperfection and weakness of her procreative organs or to some disease, then it is proper to show her previous good health and that she had borne healthy children. *Ib.*
18. **Misconduct of Counsel: Rebuke by Court.** Attorneys should keep their fights of eloquence and their invectives and insinuations within the limits of the issues of the case, and where they transgress such bounds the trial court should administer a fitting rebuke—one that would cure the error. *Ib.*
19. **Instructions: Time to Repair.** An instruction which correctly defines the rule giving municipalities reasonable time after receiving actual or constructive knowledge of a defect, in a sidewalk, in which to make the necessary repairs, is not erroneous. *Ib.*
20. **Verdict not Excessive: Injuries Permanent.** A verdict for five thousand dollars is not excessive where the evidence shows plaintiff, a woman forty-one years old in previous good health, was injured in a most painful and serious manner and will be a pain-racked invalid the rest of her life, afflicted with an offensive, annoying and humiliating malady. *Ib.*
21. **Injuries on Stairway.** Defendant and another owned adjoining two-story buildings having a common stairway leading to the second floor. Plaintiff was the tenant of the latter and was injured by a fall upon the stairway. The roof over the stairway leaked and ice accumulated upon the steps, and caused plaintiff to fall. Each owner claimed and was in possession of the roof over his building. Plaintiff's landlord, some time before the accident, put a new tin roof on its building, including the roof over half of the stairway, but this did not stop the leak. Water from the leak continued to fall principally from the middle of the stairway. *Held*, that as it was, under the evidence, as reasonable to infer that the defect was in the roof of the adjoining building as that of the defendant, the demurrer to the evidence was properly sustained. *Collins v. Tootle Estate*, 551.
22. **Demurrer to Evidence: Jury.** Where evidence presents two or more probable causes of an injury for one of which defendant would be liable and not for the others, the jury should not be allowed to make a capricious selection from such probabilities. *Ib.*
23. **Master and Servant.** Plaintiff sued for damages for the death of her husband, who was an employee of defendant at its powder plant. It was *held*, that the evidence presents the issue of defendant's negligence as one of fact for the jury to determine. *Jewell v. Manufacturing Co.*, 555.
24. **Evidence: Expert Witness.** An expert is one who is skilled in any particular act, trade or profession, being possessed of pe-

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cullar knowledge concerning the same, and where one qualifies as an expert the weight to be given his opinion is an issue for the jury to determine. *Jewell v. Manufacturing Co.*, 555.

25. **Safe Appliances: Purchased from Standard Maker.** Where an appliance furnished by the master is not complicated or dangerous and is purchased from a reputable and standard maker, minute inspection is not required of the master, but if the appliance is put to a hazardous use, the master must exercise reasonable care to ascertain if it is in a reasonably safe condition for the purpose of its intended use. *Ib.*
26. **Humanitarian Doctrine.** Plaintiff's husband was struck and killed by one of defendant's trains while he was on the track picking up coal. *Held*, that the evidence failed to make out a case under the humanitarian doctrine. *Schupp v. Railroad*, 597.
27. **Same: Contributory Negligence.** An engineer seeing a man on the track ahead has the right to assume, until the contrary appears, that the man is observing due care for his own safety and will step out of the way in time. *Ib.*
28. **Same: In Peril.** It is not sufficient, in order to recover under the humanitarian doctrine, to show that the engineer actually saw the deceased in time to have stopped or checked the train, but it must be further shown that the engineer discovered that he was in peril in time to have avoided striking him. *Ib.*
29. **Master and Servant: Defective Brake.** Plaintiff, a brakeman, while standing beside a car giving signals for switching to the engineer, was struck in the face by a fragment from a brake shoe which had fallen down to the track and broke. The car did not belong to defendant, but was a foreign car. The key which held the brake shoe to the brakehead was missing from its proper place, and the brake shoe fell in consequence thereof while the car was in motion. *Held*, that under the evidence the jury were entitled to believe that reasonably careful visual inspection would have disclosed the instability of the key and the likelihood of its loss, and that a brake so worn and defective that its key would not remain in place during the transportation of the car, was not a reasonably safe appliance. *Bassett v. Railroad*, 619.
30. **Collision: Noise of Approaching Train.** Plaintiff, driving a horse hitched to a buggy, stopped near the corner of a mill facing east, to transact some business. The horse became frightened at the loud and unusual noise of an approaching fast mail train running at high speed became unmanageable, and collided with the rear coach of the said train. Before the collision, the plaintiff was thrown out and severely injured. The horse was killed, the buggy wrecked. *Held*, that the noise that caused the plaintiff's horse to run away, and thereby injure it, was the result alone of the noise inseparable from the speed of the train, therefore, the plaintiff could not recover. *Huff v. Railroad*, 632.
31. **Rate of Speed: Recovery.** The rate of speed of a railroad train does not, of itself constitute negligence, but actual negligence must be shown in order to authorize a recovery. *Ib.*

NEGLIGENCE—Continued.

32. **Unusual Noise: Testimony: Witnesses.** The testimony of witnesses, that the train made a loud and unusual noise has no probative force, because the noise of a train is commensurate with its speed. *Ib.*
33. **Trespasser.** A person who obtains a free passage from an engineer and rides on the back of the engine, even though directed to do so, is a trespasser, and entitled only to demand that he be not wilfully and recklessly injured. *Roberts v. Railroad*, 639.
34. **Ordinary Care.** The failure to exercise ordinary care, after it is discovered that a person is in peril, amounts to a degree of reckless conduct that may well be termed wilful and wanton. *Ib.*
35. **Same.** It is not negligence to stop a train suddenly, with jars more or less severe, as they are ordinary incidents to the movements of the trains. *Ib.*
36. **Alighting from Street Car: Admissions.** Plaintiff sued for damages for injuries she received when an electric street car started before she had alighted therefrom, and she was thrown to the street. She stated repeatedly, on direct and cross-examination, that the car started just as she was in the act of stepping down to alight, but finally in answer to a leading question as to whether she started to get off the car after it started, coupled with another question whether or not a man swung on to the car against her just before she started to get off, she answered, "yes." *Held*, that plaintiff was misled by the question, and the court properly refused to direct a verdict for the defendant. *Hutton v. Street Railway*, 645.
37. **Injuries to Passengers: Alighting from Car.** Plaintiff was in the act of getting off a street car at a regular stopping place, but before he could get down, the car started and threw him to the pavement. *Held*, that if plaintiff told the truth concerning the manner in which he was injured, he was entitled to recover and the truth of his testimony was a question for the jury. *Turley v. Street Railway*, 655.
38. **Master and Servant: Custom.** As a general rule, the master in conducting his business in the usual and customary manner, is not chargeable with negligence, but custom prevails upon the theory that experience has demonstrated that it is reasonably safe, and if an act is done in a negligent manner, it cannot be justified on the ground that it is the custom. *O'Dowd v. Railroad*, 660.
39. **Same.** In an action for damages by a switchman who was injured while engaged in switching a car on to a track, at the other end of which another crew shoved in some cars that collided with the one in charge of plaintiff and injured him. The yards were so situated that the switching crew, at one end, could not see the plaintiff and his associates. *Held*, that under the evidence the court was fully justified in submitting the case to the jury upon the question whether or not the switching that caused plaintiff's injury was done in a negligent manner. *Ib.*
40. **Instructions: Roads and Highways.** In an action for damages caused by a collision on a public highway between an automobile and a vehicle drawn by horses, an instruction which told the

NEGLIGENCE—Continued.

jury that, "the law imposes no duty on the owners of vehicles on streets or highways to turn from the center of same, unless it became necessary to allow vehicles moving in the opposite direction to pass them," is erroneous because it is contrary to the provisions of section 10540, R. S. 1909. *Haden v. McColly*, 675.

41. **Same.** The statute requires persons driving on public highways to turn to the right on meeting another vehicle going in an opposite direction, and they are not permitted to continue in the center of the highway because in their judgment there is sufficient room for the others to pass without collision, the only exception being in favor of heavily laden wagons. *Ib.*
42. **Collision in Street.** The plaintiff, a minor was riding a bicycle west on the north side of a public street and close to the outside rail of the street car track, when the driver of the defendant's laundry wagon, which was standing near the curb on the same side of the street and facing the same way as the plaintiff, suddenly, without looking around, pulled the horse around into the plaintiff's course, thus causing the plaintiff to collide with the legs of the defendant's horse, whereby the plaintiff fell and was injured. *Held*, that driver of the wagon was guilty of culpable negligence. *Vanneman v. Laundry Co.*, 685.
43. **Duty of Drivers of Vehicles.** It was negligent for the driver of wagon in a crowded street not to keep a proper lookout so as to prevent collisions. *Ib.*
44. **Ordinary Care.** Everyone while traveling on a street, is required to exercise ordinary care so that he may not interfere with its reasonable use by other travelers. *Ib.*

NONSUIT.

1. **Voluntary: Demurrer to Evidence.** Where the defendant, at the close of plaintiff's evidence, asks an instruction in the nature of a demurrer to the evidence and the court announces an intention to give the instruction, a nonsuit, taken before the ruling is made and exceptions saved thereto, is voluntary. *Rubber Co. v. Wernicke*, 128.
2. **Voluntary and Involuntary.** A voluntary nonsuit is where the suit is terminated by the voluntary action and free will of the plaintiff while an involuntary nonsuit is when the plaintiff by some adverse ruling of the court which precludes a recovery is compelled to take a nonsuit. *Ib.*
3. **Voluntary: Judgment Final: No Appeal.** Where the nonsuit is voluntary the judgment is final and not open to review in the appellate court. *Ib.*

NUISANCES. See *Municipal Corporations*, 14, 15, 17, 18.

Railroads: Maintaining Embankments: Waters and Watercourses. In an action for damages against a railroad company, the petition alleged that the waters gathered by defendant's embankments "stood upon defendant's property and formed a pond thereon, into which defendant drains or permits to drain or flow other waters, slops and fifth from a roundhouse, a boarding-house and privies in the vicinity; that said pond overflowed

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defendant's said property and onto plaintiff's said property and at times covers and stands upon the whole thereof, carrying and depositing said filth thereon; that the waters in said pond are and always have been foul, and emit foul odors and the deposit of said filth on plaintiff's said property, etc." *Held*, that the word "permit" was not used in the sense of passively suffered, but the petition should be construed as charging defendant with affirmative action in permitting waters other than surface water and slops and filth to drain into the pond and overflow upon plaintiff's land. *Gorman v. Railroad*, 320.

NUNC PRO TUNC.

1. **Judgment Entered: Presumption: Evidence.** A judgment entered in the judgment record is presumptively the judgment rendered by the court, and to correct it by proceedings *nunc pro tunc*, after the term, oral evidence is not admissible. The only competent evidence is from the judge's docket or the clerk's minutes or other record in the cause showing that a different judgment was rendered. *Monk v. Railroad*, 692.
2. **Same: Judge's Docket: Clerk's Minutes: Silence.** If reliance is placed on the judge's docket and clerk's minutes to correct a judgment, *nunc pro tunc*, they, to authorize the correction, must show that the judgment entered is not the one which the court rendered. The mere silence of the docket and the minutes as to a part of the judgment entered on the record, is not sufficient to authorize that portion to be stricken from the judgment. *Ib.*

OFFICER.

1. **Arrest: Flight: Firing Upon.** In attempting to apprehend one charged with a violation of a municipal ordinance, or a misdemeanor, who has taken to flight, an officer has no right to kill him, or to fire upon him with intent to do so. *Stanberry v. O'Neal*, 709.
2. **Same: Assault with Intent to Kill: Defense of Brother.** Where a city marshal in attempting to apprehend a person fleeing from arrest for violation of a municipal ordinance, attempts to kill him by firing upon him with a pistol, the brother of such person has a right to defend him by resisting the officer. *Ib.*

PARTIES. See Principal and Surety, 6; Unlawful Detainer, 1, 3.

PARTNERSHIP.

1. **Priority of Creditors: Rights of Partners.** Where a partner pays firm's debts with his individual funds, being separately as well as jointly liable therefor, he does not become subrogated to the rights of such creditors against the partnership. He only acquires a valid demand against his partners which should be paid out of what remains after the partnership creditors are fully satisfied. *Elevator Co. v. Thomson*, 170.
2. **Action on Contract: Pleading: Variance.** In an action by partners on a contract alleged to have been entered into between the plaintiffs, as a partners, and the defendant, the plaintiffs can not recover on proof of a contract made by the defendant with one of them individually. *Michael v. Kennedy*, 462.

PAVING.

1. **Repairs: Street Commissioner.** Substitution of the paving of the principal part of a street for its entire length, with new paving, is not a repair, and is not authorized under the statute as to cities of the fourth class, to be made informally by the street commissioner or an improvement committee. *Noel v. Lees Summit*, 114.
2. **Same: Reconstruct: Statute.** The word "reconstruct" ordinarily means to rebuild, to construct anew. But its meaning may be modified in a statute for street paving by being so connected with the word "repair," as to show it to be synonymous with or limited in meaning to that of repair." *Ib.*
3. **Same: Tax Bills.** A street more than one mile long, in a town of 1450 inhabitants, had been macadamized for fifteen years to a width of twenty feet at one part and thirty-two at another. It became worn away in the center and the improvement committee informally contracted the work of rebuilding it eight inches deep, to a width of fourteen feet at one part and twenty feet at the other, to a contractor who constructed it. *Held*, that this was not a repair as authorized by section 9411, Revised Statutes 1909, to be contracted for informally by the committee, and the tax bills issued against abutting property were invalid. *Ib.*

PAYMENT.

Time of Payment: Evidence: Presumptions. When payment is shown to have been made, but there is no evidence of when it was made, it is presumed to have been made on the day the debt was due. *Lawler v. Vette*, 342.

PERSONAL INJURIES. See *Damages*, 1, 3; *Evidence*, 7; *Negligence*, 15; *Railroads*, 6; *Street Railways*, 5, 6, 7, 8, 9, 10, 11.

PLEADING. See *Contracts*, 7; *Estoppel*, 1, 2; *Mechanics' Liens*, 1, 2, 3; *Municipal Corporations*, 3; *Negligence*, 6; *Partnership*, 2; *Real Estate Broker*, 1; *Releases*, 1; *Subrogation*, 4, 5.

1. **Derailment: Cause of: Prima Facie Case.** In an action for damages for injuries caused by the derailment of a street car it is only necessary in order to make a prima facie case of negligence to plead and prove that the injury was caused by the derailment of the car while the person injured was in the lawful use of a public street. *Kalver v. Railroad*, 198.
2. **Specific Negligence: Evidence.** Where specific acts of negligence are pleaded, recovery must be upon proof of one or more of such pleaded acts, and the burden is on the pleader to show not only negligence as alleged but that such negligence was the direct and proximate cause of the injury. *Haake v. Davis*, 249.
3. **Proof: Variance.** In an action in equity for contribution, on the ground of joint liability of plaintiff and defendant on a judgment rendered against them on a promissory note, which judgment had been discharged by plaintiff, a recovery could not be had on proof that plaintiff signed the note merely as surety for defendant and that the latter was, therefore liable for the full amount of the judgment, since one cannot sue on one cause of action and recover on another, and the cause of action counted on was in equity, while the proof disclosed a cause of action at law. *Hespos v. Winkelmeyer*, 532.

PRIMA FACIE CASE. See **Contribution; Pleading, 1.**

PRINCIPAL AND AGENT. See **Evidence, 1; Money Had and Received.**

1. **Unauthorized Admissions of Agent: Evidence: Appellate Practice: Abstract: Omission of Immaterial Matter.** Where a contract for the sale of threshing machinery provided for notice of any defects warranted against to be given by registered mail to the selling company direct, and the local selling agent had no authority to make any representations or waiver with respect to the machinery, correspondence between such agent and the buyers had no bearing on the issue of notice of such defects to the seller, and hence its omission from the abstract of the record was immaterial. *Gaar-Scott & Co. v. Nelson*, 51.
2. **Money Had and Received: Liability of Agent: Payment to Principal.** The agent of a real estate broker, who negotiated, on behalf of his principal, a sale of land, was not liable to the purchaser, in an action for money had and received, for a part of the purchase price paid to him and by him turned over to his principal without knowledge that the deed delivered to the purchaser by his principal was a forgery, since an agent who receives money for his principal is relieved from liability if he pays over such money to his principal without notice of any claim thereto on the part of the person from whom he received it. *Lang v. Friedman*, 354.
3. **Evidence: Admissions of Agent: Evidence of Agency.** In an action against a railroad company for conversion of a shipment of goods, uncontradicted evidence that plaintiff, having gone to the general freight office of defendant relative to the shipment, an undisputed agent of defendant pointed out to him, as the chief clerk of defendant and in charge of the matter, a person sitting at a desk in such office, ostensibly engaged in defendant's business, and that such person took up the matter with plaintiff in a manner showing he was familiar with it and that it was within his charge, was sufficient to establish his agency for defendant, so as to render his conversation on such occasion, relative to the shipment, admissible in evidence against it. *Storage & Moving Co. v. Railroad*, 521.

PRINCIPAL AND SURETY.

1. **Building Contracts: Schools: Subletting Contract: Liability of Surety.** A firm of contractors contracted to construct a school building and install a heating system therein, and subsequently the partners transferred their partnership interests to a corporation, in consideration of certain shares of its capital stock issued to them, which corporation, with the acquiescence of all parties took over the work called for by the contract, and contracted with another company to install the heating system, which after installation, was accepted by the board of education. *Held*, that the legal effect of the transactions was a subletting of the original contract to the corporation and a subletting by the corporation to the company installing the heating system, and that the latter company was not a mere volunteer, and hence was entitled to maintain an action on the bond, given by the original contractors, as required by section 6761, Revised Statutes 1889, for the unpaid balance due for installing such system. *Board of Education v. Fidelity & Guaranty Co.*, 410.

PRINCIPAL AND SURETY—Continued.

2. **Same.** While the liability of a surety on a building contractor's bond extends only to those in privity by contract with the original contract, this privity need not be direct, but may be through a contract with a sub-contractor, if the labor and material furnished thereunder fall within the original contract. *Board of Education v. Fidelity Co.*, 410.
3. **Same.** Where a building contractor, who had contracted to build a school building and install a heating system therein, sublet the contract, and the sub-contractor sublet the installation of the heating system, there was a privity of contract between the company installing the heating system and the original contractor, and the sureties on the original contractor's bond were liable for the cost of installing the heating system. *Ib.*
4. **Building Contracts: Liability of Surety: Knowledge of Surety.** It is not material to the liability of the surety upon a building contractor's bond, for labor and material furnished under a contract with the sub-contractor, whether, the surety did or did not know who the sub-contractors were to be, at the time of the execution of the bond. *Ib.*
5. **Same: Schools: Instructions.** In an action on a bond given to a board of education by a contractor who had entered into a contract to erect a school building and install a heating system therein, conditioned as required by section 6761, Revised Statutes 1909 for the cost of installing the heating system, under a contract made by plaintiff with the sub-contractor, to whom the entire contract was sublet by the original contractor, *held*, that a declaration of law given by the court (the case being tried without a jury), which is epitomized in the opinion, indicates that the court, in making its finding, followed the correct theory of law. *Ib.*
6. **Same: Action on Bond: Parties.** A material man may maintain an action against the surety in a bond given by a building contractor pursuant to section 6761, Revised Statutes 1899, without making the contractor a party defendant. *Ib.*

PROXIMATE CAUSE. See Negligence, 9; Railroads, 1, 3, 4; Street Railways, 13.

RAILROADS. See Nuisances; Statute of Limitations, 2, 3.

1. **Crossing Accident: Failure to Give Statutory Signals: Proximate Cause: Instructions.** In an action against a railroad company for the death of a child, killed by being struck by an engine at a crossing, an instruction given for defendant, that although the jury might believe that the bell on the engine was not constantly sounded for eighty rods before reaching the crossing, yet if they further found that such failure to ring the bell was not the direct or a contributing cause of the collision, their verdict should be for defendant, was not erroneous on the ground that it did not recognize defendant's duty to ring the bell constantly until the engine passed over the crossing as required by section 3140, Revised Statutes 1909, for the reason that decedent was struck before the engine passed over the crossing, and hence the failure to keep the bell ringing while the engine was passing over it was immaterial; and, moreover, an instruction given for plaintiff covered the matter, by charging the jury, that, before they could exempt defendant, the evidence must show, among other things, "that at the time said

RAILROADS—Continued.

engine ran upon said crossing, the bell on said engine was rung eighty rods from said crossing and kept ringing until such engine crossed said street." *McNulty v. Railroad*, 439.

2. **Crossing Accident: Contributory Negligence of Child: Instructions.** In an action against a railroad company for the death of the child, eight years and seven months old, who was killed by being struck by an engine at a crossing, instructions submitting to the jury the question whether or not the child was guilty of contributory negligence are *held* free from error, so far as plaintiff is concerned. *Ib.*
3. **Same: Injury to Child: Suddenly Going In Front of Engine: Negligence: Proximate Cause.** The operator of a railroad engine is not required to anticipate that a child may leave a place of safety near the track and suddenly dart upon the track immediately in front of the engine, but has a right to assume that the child will remain in the place of safety, until it becomes reasonably apparent that he intends to cross the track, and if, after he starts to cross the track, the engine cannot be stopped in time to avert striking him, the railroad company can not be held liable for his death, on the ground the operator of the engine failed to keep a proper lookout ahead, since the keeping of a lookout would not have prevented the accident, and hence the failure to keep it was not the proximate cause of the accident. *Ib.*
4. **Same: Instructions: Facts Stated.** A child, eight years and seven months old, was struck at a crossing by the tender of an engine, which was running backwards. The evidence most favorable for plaintiff tended to show that decedent was standing about twenty-five feet from the track and ran diagonally across the street toward the track, the engine then being thirty or forty feet away and running at a speed of from four to six miles per hour. When the engine was stopped after collision, its nearest part (the front end) was fifteen feet beyond the point of collision. In an action against the railroad company for the death of the child, *held*, that the evidence did not show the engine could have been stopped in time to have avoided the accident, even if the crew had seen decedent start to cross the street, and therefore, the failure of the crew to look ahead of the engine could not have been the proximate cause of the accident; and hence it is *held*, that the court did not err in instructing the jury that plaintiff could not recover on the charge that defendant's servants failed to look ahead of the engine to see whether its movements endangered persons on the crossing, and failed to stop or slow up the engine before it struck the child. *Ib.*
5. **Crossing Accident: Injury to Child: Last Chance Doctrine.** Where the position of a child, eight years and seven months old, when seen by a crew operating an engine approaching a crossing, was not such as to lead them to suppose that she was in imminent danger of injury from the engine, and they had no chance to prevent running over her after she started to cross the track, there could be no recovery, under the last clear chance doctrine, for her death. *Ib.*
6. **Negligence: Personal Injury: Question for Jury.** Plaintiff, a section man, was sent by his foreman down the railroad track at night to flag an approaching passenger train at a dangerous

RAILROADS—Continued.

place on the track. A slow order had limited speed of trains over such track to five miles an hour. Plaintiff testified that when the train approached, he was standing in the position he had been ordered to take, and that he gave the slow signal, but receiving no response, remained on the track, repeating the signal, until too late to escape injury because of the speed of the train. The train approached on a straight track, at night, and plaintiff testified that it was impossible to judge its speed. There was evidence showing the train was running at a speed much greater than that limited by the slow order. *Held*, in an action for damages for such injury that there was sufficient evidence to make a question for the jury, and that a demurrer to the evidence was improperly sustained. *Monk v. Railroad*, 692.

REAL ESTATE. See Marketable Title.

REAL ESTATE BROKER.

1. **Dual Agency: Pleading: Amendment.** Dual agency of a real estate broker, unknown to the parties, will defeat a claim for commission for bringing the parties together in an effort to consummate an exchange of property. But to be available as a defense it should be pleaded. If the dual agency is not known to defendant until during the progress of the trial, defendant should obtain leave to amend his answer. *Gray v. Novinger*, 85.
2. **Action for Commission: Sufficiency of Evidence.** In an action by a firm of real estate brokers for a commission in effecting a sale of land for \$4400, an averment in the petition, that defendant had agreed to pay plaintiffs any amount in excess of \$4000 realized from the sale, was not supported by a letter from one of the plaintiffs to defendant, stating that he was offered \$4000 for defendant's land and asked no commission, and a telegram from defendant in response, stating that he would take \$4000. *Michael v. Kennedy*, 462.

RELEASES.

1. **Rescission: Pleading.** A release which was fraudulently or wrongfully procured from the plaintiff may be attached by the reply, as provided by section 1812, Revised Statutes 1909, or may be set up in the petition as an anticipated defense and there attacked. *Logan v. United Railways*, 490.
2. **Same: Sufficiency of Evidence.** In an action for personal injuries, where defendant pleaded a release in the answer, and plaintiff, in the reply, set up that the release was fraudulently procured while she was in such a mental condition that she did not understand what she was signing, *held*, that the evidence was sufficient to warrant submission to the jury of the issue raised by the reply. *Ib.*

REPLEVIN.

Contracts: Evidence: Interlineation. Where it is shown in an action to replevin a house built by a tenant on a farm under an agreement with the owner to permit its removal when possession of the farm was surrendered, that when the farm was subsequently sold and the owner desired to give the purchaser possession, it was agreed that the tenant was to give possession upon the return to him of a certain note and the payment of

REPLEVIN—Continued.

a specific amount, and that said note was returned and the money paid and a receipt containing said agreement signed by the tenant and delivered, the tenant is not entitled to recover, notwithstanding he, subsequently to the execution and delivery, made interlineations in the receipt by which he reserved to himself the house. *Cunningham v. Atterbury*, 137.

RES ADJUDICATA.

Judgments: Premature Action. The dismissal of a suit on the ground it was brought before a right of action had accrued, will not bar another action thereon. *Lawler v. Vette*, 342.

ROADS AND HIGHWAYS. See *Negligence*, 40, 41.

SALES.

1. **Action for Purchase Price: Evidence: Negative Allegation: Burden of Proof.** In an action for the purchase price of pumping apparatus, bought under a contract warranting the pumps to furnish three hundred gallons of water per minute, "conditioned that the wells will furnish three hundred gallons per minute," the burden was on the plaintiff to prove that the cause of the failure of the pumps to pump the specified amount of water was the insufficiency of water in the wells, under the rule, that, although the burden of proof generally rests upon the party holding the affirmative of the issue, yet where the plaintiff grounds his right of action on a negative allegation and the proof of the affirmative is not peculiarly within the defendant's power, the plaintiff must establish such negative allegation to make out a *prima facie* case. *Compressed Air Co. v. Fulton*, 11.
2. **Same: Sufficiency of Evidence.** In an action for the purchase price of pumping apparatus, bought under a contract warranting the pumps to furnish three hundred gallons of water per minute "conditioned that the wells will furnish three hundred gallons per minute," evidence *held* to authorize a finding that the wells produced the required amount of water. *Ib*
3. **Breach of Warranty.** Where a city bought pumps warranted to lift a certain amount of water per minute with the expenditure of a certain amount of power, and the pumps delivered required greater power, causing an increased expense, it was not bound to accept and pay for them. *Ib*.
4. **Breach of Warranty: Waiver by Acceptance: Estoppel.** A city which bought pumping apparatus under a warranty that it would do certain work, and which made every possible effort, but without success, in conjunction with the seller's agent, to make it do such work, and, before the filing of suit for the purchase price, had offered to return it to the seller, and held it subject to the latter's order and did not use it as of right or under claim of any kind, was not estopped, by reason of its use of the apparatus, to dispute the seller's claim for payment of the purchase price, nor to deny that it had accepted the apparatus and thereby waived its right to rely upon the warranty. *Ib*.
5. **Breach of Warranty: Condition Precedent.** A provision of a contract for the sale of threshing machinery, to the effect that

SALES—Continued.

the buyer should give notice to the seller by registered mail at its home office and to its local agent of any deficiency on which a breach of warranty was claimed, within six days after the machinery was put in use, was a condition precedent to the buyer's right to claim a breach of warranty, and was not performed by mere notice to the local agent. *Gaar-Scott & Co. v. Nelson*, 51.

6. **Same: Estoppel.** A buyer of threshing machinery, under a warranty requiring him to give notice to the seller by registered mail at its home office and to its local agent, within six days after the machinery was put in use, who failed to give such notice, except to the local agent, and who kept and used the machinery through two or more seasons, was estopped to refuse payment for it on the ground of a breach of warranty. *Ib.*
7. **Breach of Warranty: Estoppel.** A buyer of threshing machinery who kept and used the machinery through two or more seasons, by writing to the seller in such a way as to convey the idea that he had accepted it and by negotiating for an extension of time for payment for it, estopped himself from claiming failure of consideration by reason of a breach of warranty of the condition of the machinery, in an action by the seller to replevy it on his failure to pay the purchase price. *Ib.*
8. **Refusal of Buyer to Accept Remedies of Seller: Action for Contract Price.** Where, in pursuance of a contract of sale, the seller completes the article contracted for and tenders it to the buyer, and the buyer refuses to accept it and pay the agreed price, the seller may treat it as belonging to the buyer, hold it subject to his order, and recover the agreed price. *Dehner v. Miller*, 504.
9. **Same: Sufficiency of Evidence.** In an action for the contract price of baled straw, which the buyer refused to receive and which was held by the seller subject to the buyer's order, *held* that a verdict in favor of the seller was sustained by substantial testimony. *Ib.*
10. **Same: Instructions.** Defendant agreed to pay plaintiff a certain price for a certain quantity of straw which the latter was to bale for him, if delivered at a certain point, and another price if delivered at another point. After receiving part of the straw, defendant refused to receive and pay for the balance. In an action for the purchase price, brought on the theory that plaintiff was holding for defendant the straw he had refused to receive, the court charged the jury, at the instance of plaintiff, that if they found that there was a contract of sale, that it had been performed by plaintiff, that the straw had been tendered to and refused by defendant, and that plaintiff was ready, willing and able to deliver it, they should allow plaintiff such sum per ton for such number of tons as defendant had agreed to buy and pay for, less the number of tons he had received and paid for. In another instruction, given at the instance of plaintiff, the court charged, that if the jury found that defendant had purchased the straw and had received and paid for part of it, but had refused to receive the balance, and that plaintiff had the straw piled at a point from which he could have removed it to the places he had agreed to deliver it, the jury should find for plaintiff, but they should deduct from the amount

SALES—Continued.

they found, the cost of hauling the straw to the delivery points. *Held*, that there was no conflict between the instructions, and that the first instruction construed with the second, as it should be, was not erroneous; the amount of the recovery being within the limitations of the latter. *Ib*.

11. **Refusal of Buyer to Accept: Action for Contract Price: Measure of Damages.** Where, in pursuance of a contract of sale, the seller completes the article contracted for and tenders it to the buyer who refuses to accept it and pay the agreed price, and the seller holds the article for him and sues him for such price, the seller is entitled to recover, without proof that he has sustained actual damages, and the measure of damages is the contract price and not the difference between the contract price and the market value. *Ib*.
12. **Refusal of Buyer to Accept: Action for Contract Price: Evidence.** In an action for the contract price of baled straw, which the buyer refused to receive, an affirmative answer to a question propounded to the seller as to whether his wife had told him what the buyer had told her to tell him, nothing further being shown, was not vulnerable to the objection that it was erroneous as tending to show the making of another contract. *Ib*.
13. **Same: On Motion for Rehearing: Sufficiency of Evidence.** Where in pursuance of a contract of sale, the seller completed the article contracted for and tendered it to the buyer, who refused to accept it and pay the agreed price, and the seller, holding the article subject to his order, sued him for such price, an affirmative answer to a question propounded the seller, "Did you hold it for him?" was sufficient to establish that plaintiff held the article subject to the order of defendant, although the question, as put, was not in the present tense, under the rule that when the state of facts is once shown to exist, it is presumed to continue until the contrary is shown. *Ib*.
14. **Refusal of Buyer to Accept: Action for Contract Price: Instructions.** In an action for the contract price of baled straw, which the buyer refused to receive and which was held by the seller subject to the buyer's order, the court charged the jury, in an instruction given at the instance of plaintiff, that, in order to find for plaintiff, they must find, among other things, "that plaintiff had the straw baled and was ready, willing and able to deliver it to defendant." *Held*, that if this instruction was not definite enough to meet defendant's theory concerning plaintiff's duty to hold the straw, he should have asked an instruction covering it. *Ib*.
15. **Same: Not Necessary to Show Condition of Property.** In an action for the contract price of baled straw, which the buyer refused to receive and which was held by the seller subject to the buyer's order, it was not necessary for plaintiff to prove that he had protected defendant's interests by making a timely sale of the straw or by safely storing it, since, under the theory upon which the action was brought, it was not plaintiff's duty to sell and look to defendant for the loss, but he held the hay for defendant, and if, when payment is made, the hay is not produced in good condition, his liability as bailee may arise in another action. *Ib*.

SCHOOLS. See *Principal and Surety*, 1, 2, 3, 5, 6.

SLANDER OF TITLE.

1. **Damages.** Any person, who possesses an estate or interest in land, may maintain an action against any one who falsely and maliciously denies or defames his title, and thereby inflicts pecuniary damages upon him. *Long v. Rucker*. 572.
2. **Landlord and Tenant:** A tenant may maintain an action against his landlord for a false and malicious publication of a slander against the tenancy, if damage has resulted from the slander. *Ib.*
3. **Pleading and Proof.** In actions for slander of title it devolves upon the plaintiff to plead and prove that the words were false, maliciously uttered and resulted in pecuniary loss. *Ib.*
4. **Malicious Intent: Evidence.** The action cannot exist without a malicious intent and to infer the existence of malice the evidence must support a reasonable inference that the representation was not only without legal justification, but was not innocently or ignorantly made. *Ib.*
5. **Landlord and Tenant: Forfeiture of Lease.** A landlord has no right to forfeit a lease and relet the premises because the tenant *contemplates* a transfer of possession to the purchaser of his business. *Ib.*

STATUTES CITED AND CONSTRUED.

Revised Statutes, 1909.

Section 99, see page 175	2375, see page 243
188, see page 197	2778, see pages 12, 30
190, see page 175	2864, see page 443
546, see page 96	3140, see pages 260, 439, 445
583, see page 609	3150, see page 326
1192, see pages 516, 517	3389, see pages 719, 722
1770, see page 630	3390, see page 724
1772, see page 631	3391, see page 723
1787, see page 712	4352, see page 111
1804, see page 612	4451, see page 718
1812, see pages 490, 499	5425, see pages 380, 382
1844, see page 103	5427, see pages 380, 382
1889, see pages 101, 329	5662, see page 49
2029, see pages 74, 660, 664	5703, see page 104
2041, see page 68	6362, see pages 428, 435
2047, see pages 51, 63	6383, see page 592
2048, see pages 63, 74	7182, see pages 342, 350
2094, see page 617	7183, see pages 350, 721
2104, see pages 613, 618	7657, see pages 33, 35
2263, see pages 69, 79	7896, see pages 69, 71
2275, see pages 70, 79	9411, see pages 115, 117
2335, see pages 69, 76	10540, see pages 675, 679

Revised Statutes, 1899.

Section 1362, see page 722	4123, see page 71
1363, see page 724	6761, see page 414
1364, see page 728	6762, see page 414
3321, see page 35	6962, see page 49
3708, see page 350	

STATUTES CITED AND CONSTRUED—Continued.

Revised Statutes, 1889.

Section 562, see page 77

Revised Statutes, 1855.

Section 18, Chapter 40, see page 81.

Revised Statutes, 1845.

Section 6, Chapter 35, see page 79.

Section 18, Chapter 35, see page 79.

Section 6, Chapter 40, see page 80.

Acts, 1911.

Page 139, see pages 69, 74, 660, 664.

Acts, 1891.

Page 45, see page 77.

Acts, 1885.

Section 6, see pages 681, 682.

STATUTE OF FRAUDS.

Parol License to use Real Property: Evidence. Where a cut was made and a levee constructed across the corner of a tract of land owned by another, pursuant to permission given by him, the rights thereby created were not within the Statute of Frauds, and parol evidence was admissible to establish them. [NORTON and CAULFIELD, JJ., concurring.] *Grandstaff v. Bland*, 41.

STATUTE OF LIMITATIONS.

1. **Permanent Nuisance: When Statute Commences to Run.** Where a nuisance is permanent in character and causes damage which will continue so long as it remains, the entire damage, present and prospective, accrues as soon as the condition causing it comes into existence and is discoverable, and hence it is the subject of a single action, which is barred when not brought within the period of limitation after its accrual. *Gorman v. Railroad*, 320.
2. **Same: Railroads: Embankments: Waters and Watercourses.** Th building of solid railway embankments, permanent in character, which immediately caused surface water to back up and overflow adjoining land and which would continue to have that effect, so long as they remained, caused a permanent nuisance an action for damages for the maintenance of which, not commenced for sixteen years, was barred by the Statute of Limitations; and whether the five or the ten-year statute was applicable is not determined. *Ib.*
3. **Continuing Nuisance: Railroads: Embankments: Waters and Watercourses.** Although a landowner's cause of action against a railroad company, for water flowing on his land in its natural volume, by reason of embankments, is barred by the Statute of Limitations, yet he would have a cause of action for the

STATUTE OF LIMITATIONS—Continued.

pollution and artificial increase of the waters which overflowed and thereby damaged his land, by reason of the railroad company's actively permitting other waters, slops and filth to drain into the pond formed by its embankment, and which overflowed such land, since that is not a natural and necessary consequence of the original erection of the embankment and could not have been recovered for in a single suit in advance, and hence is not barred by reason of the fact that the action for damages resulting from the overflowing of the waters in their natural volume is barred. *Gorman v. Railroad*, 320.

4. **Same: Five Year Statute: Waters and Watercourses.** A cause of action for damage to land by actively permitting polluted water to overflow the same is barred by the five-year Statute of Limitations (Section 1889, Revised Statutes 1909). *Ib.*

STREET RAILWAYS. See Negligence, 5.

1. **Fire Wagon: Street Car Track: Ordinance.** Plaintiff was a fireman on a fire wagon forty-five feet long and in making the run to a fire had to turn from one street into another, which made it necessary that he stop the wagon across a street railway track. There was a city ordinance requiring street cars to stop when a fire wagon was approaching, and giving such wagon paramount right of way. It was *held* that though the fireman saw defendant's street car approaching he had a right to assume that it would stop; and that if when the car got close enough to be a warning to him that it would not stop, he had no opportunity to save himself by jumping off the wagon, he could recover damages for his injuries resulting from the collision. *Taylor v. Railroad*, 131.
2. **Same: Custom Pleading.** If an ordinance of a city gives right of way to a fire wagon running to a fire, and requires a street car to stop when a wagon approaches, it is not error to permit evidence that the street cars did customarily stop, though there was no custom pleaded, since such evidence was only proving obedience to the ordinance. *Ib.*
3. **Expert Evidence: Cars on Line: Identical Car.** Expert evidence of the distance in which street cars which run on a certain line could be stopped at a certain place when going at a given speed, may be given without confining the question to the identical car which had caused the injury. *Ib.*
4. **Damages: Instruction: Reasonably Likely.** It is not error in an instruction on the measure of damages to use the word "likely" instead of "certain," the instruction reading that plaintiff should be allowed damages for such future pain and suffering "as he is reasonably likely to suffer." *Ib.*
5. **Personal Injury: Belief of Motorman and of Plaintiff.** In a case under the humanitarian rule, though the plaintiff sees the approaching street car and attempts to cross the track in the belief that he can get over ahead of the car, this will not, as a matter of law, justify the motorman in believing the plaintiff will get safely over and excuse him from putting his car under control. *Strauss v. Railroad*, 153.
6. **Same: Humanitarian Rule: Contributory Negligence.** In a case under the humanitarian rule, plaintiff's prior contributory

STREET RAILWAYS—Continued.

negligence in getting himself in a perilous position, will not excuse the servants of the street car company in running him down, who have seen his peril in time to have stopped the car. Under the humanitarian rule contributory negligence is admitted. *Ib.*

7. **Same: Evidence: Objection: Time.** When a question is asked of the plaintiff about injuries which he has not included in those specified in his petition, and objection is made and objections stated to the court which do not include its not being pleaded, and they are overruled, and the witness answers, it is too late then to urge the failure to plead, as a reason why the question should not have been asked. *Ib.*
8. **Personal Injury: Humanitarian Rule: Instructions: Assuming Facts.** It is not improper, in a case of personal injury founded on the humanitarian rule, to refuse an instruction for defendant which assumes as facts matters which are in controversy. *Clark v. Railroad*, 156.
9. **Same: Practice: Evidence: Motion to Strike Out.** When an improper question is answered before objection can be made, the proper practice is to move to strike it out. *Ib.*
10. **Humanitarian Rule: Personal Injury.** The humanitarian rule is a doctrine of the law, which, in one of its phases, casts liability upon a negligent street railway company whenever its servants, operating its car on a public street, see, or by the exercise of ordinary care could see, a street traveler in danger from the going car, and thereafter fail to exercise ordinary care in the use of means at hand to avoid injuring him, when such ordinary care, having regard to the safety of passengers, could have saved the traveler. *Smeltzer v. Railroad*, 204.
11. **Same: Contributory Negligence: Right to Recover.** S was driving a covered milk wagon along the west side of a street and desiring to cross to the east side he stopped and looked back for a street car and saw one approaching, 150 feet away, at a speed of twelve or fifteen miles per hour. He, notwithstanding this, attempted to cross, and was struck by the car. There was evidence that the street car was seventy-five feet away when the horse got on the track and that the car could have been stopped, by use of ordinary care, within thirty-five or forty-five feet. It was held that S was guilty of contributory negligence, but that he could recover damages under the humanitarian rule. *Ib.*
12. **Injuries to Passenger: Explosion in Controller Box: Panic Among Passengers: Instructions.** In an action against a street railway company for injuries received by a passenger in being thrown between the seats of a street car by other passengers, who, with plaintiff, were endeavoring to escape from the car on account of fear of injury, caused by fire and smoke from the explosions in the controller box, an instruction, summarized in the opinion, *held* to be based upon substantial evidence and within the allegations of the petition. *Logan v. United Railways*, 490.
13. **Same: Proximate Cause.** In an action against a street railway company for injuries received by a passenger in being thrown between the seats of a street car by other passengers, who,

STREET RAILWAYS—Continued.

with plaintiff, were endeavoring to escape from the car on account of fear or injury, caused by fire and smoke from explosions in the controller box, where it appeared that the motorman failed to take steps to stop the car, after the explosion, until it had run several blocks, *held* there was a causal connection between the explosions and the panic among the passengers, and between the explosions, the fire, smoke and alarm and the alleged negligence of the motorman in failing to stop the car. *Logan v. United Railways*, 490.

SUBROGATION.

1. **Insane Person: Volunteer.** If one pays the debt of an insane person, which is secured by mortgage on real estate, and makes the payment in order to prevent a sale under the mortgage and save the property for the insane person, he is not a volunteer and may be subrogated to the rights of the mortgagee in the mortgage debt. *Petty v. Tucker*, 98.
2. **Same: Limitations.** If one pays the mortgage debt of an insane person in order to save it from sale under the mortgage, an equitable obligation arises in favor of the party making the payment and he has a right of subrogation to which the five years period of the Statute of Limitations applies, which he must assert within that time and not the period applicable to the limitation of the original debt. *Ib.*
3. **Same: New Promise: Writing: Contract: Statute.** In order to revive an obligation due from an insane person to one who pays his mortgage debt to prevent a sale of his land, the promise of the insane person, after becoming sane, to reimburse the party making the payment, must be in writing. The Statute of Limitations in using the word "Contract" in reference to new promises, includes an equitable obligation. *Ib.*
4. **Same: Pleading.** Where a debt barred by the Statute of Limitations, is revived by a new promise in writing, in an action on such revived obligation the petition should allege the new promise to be in writing. *Ib.*
5. **Same: Filing New Promise: Denial: Quaere.** Where a debt barred by the Statute of Limitations, is revived by a new promise in writing, in an action on such debt, the petition is founded in part upon the new promise, and the writing should be filed with the petition, as required by statute in ordinary cases, so that the defendant, as provided by statute, may deny its execution under oath, if he so desire. *Quaere. Ib.*
6. **Same: Demurrer.** Where the petition discloses that an action is barred and does not state facts showing a valid new promise, a demurrer is a proper course of procedure. *Ib.*

TAX BILLS. See *Paving*, 3.

TRIAL PRACTICE. See *Appeal and Error*, 6, 24.

1. **Demurrer to Evidence.** Where the evidence on an issue of fact is substantially conflicting, it should be submitted to the jury. *Lang v. Friedman*, 354.

TRIAL PRACTICE—Continued.

2. **Conclusions: Necessity of Being Founded on Facts.** Courts and juries are at liberty to draw conclusions only when founded on facts in evidence, and the evidence must be substantial, a mere scintilla not being sufficient. *McNulty v. Railroad*, 439.
3. **Objection to Evidence: Time for Objection.** An objection to a question propounded to a witness which is not made until after the answer is given is properly overruled. *Déhner v. Miller*, 504.
4. **Defect of Parties: Demurrer.** A defect of parties to an action must be raised by demurrer, or answer, or the point is waived. *Snorgrass v. Thomas*, 603.

UNLAWFUL DETAINER.

1. **Right of Action: Parties: Landlord and Tenant.** Where an owner leases his premises, and the lessee, at the time of an entry and detainer by a third person, is in possession under the lease, the right of action for unlawful detainer accrues to him and not to the owner. *Prendergast v. Graverman*, 33.
2. **Right of Action: Possession.** A plaintiff, to maintain unlawful detainer, under section 7657, Revised Statutes 1909, need not actually be on the land, or keep servants there, but any act done by him on the premises, indicating an intention to hold the possession thereof to himself, is sufficient to give him actual possession and to warrant the maintenance of the action by him. *Ib.*
3. **Right of Action: Parties: Landlord and Tenant.** Where a lessee abandons the premises, the right of possession reverts to the owner, who must be considered in possession, although not personally present, so as to give him a right of action for unlawful detainer, under section 7657, Revised Statutes 1909, against a third person. *Ib.*
4. **Issues: Evidence.** An action for unlawful detainer must be determined on the relative rights of possession between the parties, and the question of title is immaterial. *Ib.*

USURY.

1. **Right of Recovery: Necessity of Full Payment by Borrower.** In order to entitle a borrower of money to recover usurious interest, under section 7182, Revised Statutes 1909, which prohibits usurious interest, and provides that the taker may be sued for any sums *paid in excess* of the principal and legal interest, there must have been an actual payment of usury, and the fact that the borrower gave his note therefor will not entitle him to recover; and not only must the amount charged as usurious interest, or some part thereof, have been paid, but the amount actually borrowed and lawful interest thereon must also have been paid, before any amount can be recovered as usury. *Lawler v. Vette*, 342.
2. **Remedies of Borrower: Equity: Rescission.** Where a usurer fails to sue on a note representing the usurious part of a transaction, and holds it, claiming a lien therefor on the borrower's property, the borrower may have it canceled or have other equitable relief, upon paying or tendering the principal and lawful interest. *Ib.*

USURY—Continued.

3. **Payment of Notes: Time of Payment: Evidence.** In commercial transactions, the presumption is, that the usual course of business was followed by the parties thereto; so that where, in an action for usury, the borrower showed that the notes given for the loan, upon which usury was claimed to have been charged, had been paid; but did not show when they were paid, payment on the day the debt was due is presumed. *Lawler v. Vette*, 342.
4. **Right of Recovery: Premature Action.** Where only a portion of the notes representing a sum borrowed and interest thereon had been paid at the beginning of a suit to recover a sum alleged to have been paid as usury, and the balance, amounting to much more than the amount claimed to have been usuriously taken, was not paid until after the suit was brought there had been no payment of something in excess of the amount actually borrowed and lawful interest thereon, without which no cause of action accrued, and hence, as plaintiff must recover on a right of action that existed at the time the suit was instituted, his suit was prematurely brought. *Ib.*

VERDICT.

Not Excessive. Where the injuries consist of two broken ribs, injuries to hip and pain of body and mind suffered, a verdict for \$1500 is not excessive. *Turley v. Street Railway*, 655.

WAIVER. See *Insurance*, 4; *Life Insurance*, 10, 12; *Witnesses*, 6, 7.

Ratification: May not Be Recalled: Life Insurance. Where a waiver once attaches or a ratification is once had, it can not be recalled by the one making it. *Bell v. Insurance Co.*, 390.

WATERS AND WATERCOURSES. See *Nuisances: Statute of Limitations*, 2, 3, 4.

1. **Definition.** The definition of a watercourse, as given in *Benson v. Railroad*, 78 Mo. 504, is adopted. [Per REYNOLDS, P. J.] *Grandstaff v. Bland*, 41.
2. **Natural Watercourses: Sufficiency of Evidence to Establish.** A creek in which there was a flow of water in wet weather only, although pools of water stood in its bed and there were a few springs along it from which water flowed in wet weather, and which was without defined banks in many places, is held by REYNOLDS, P. J., not to be a watercourse. Held, by NORTON, J., that the evidence tends to prove the creek is a natural watercourse. CAULFIELD, J., expresses no opinion on this question. *Ib.*
3. **Surface Water.** The common law rule as to surface waters prevails in this state—that is, owners of lands may improve them by obstructing or diverting such waters, provided it be not done in a reckless manner resulting in injury to some other person [Per REYNOLDS, P. J.] *Ib.*
4. **Injunction: Enjoining Interference with Watercourse: Sufficiency of Evidence.** In an action for a mandatory injunction by landowners to compel another landowner to remove a dam constructed by him across, and to fill up a ditch and remove a levee constructed by him along, an alleged natural watercourse, and to enjoin him from further damming up or diverting the

WATERS AND WATERCOURSES—Continued.

flow of water in such watercourse through the lands of plaintiffs, *held* by REYNOLDS, P. J., that the evidence does not show that the levee, dam and ditch tended to throw any more water on the lands of plaintiff than had spread over them during high water before the levee, dam and ditch were constructed. *Ib.*

5. **Same: Statute Considered.** In an action for a mandatory injunction by landowners to compel another landowner to remove a dam constructed by him across, and to fill up a ditch and remove a levee constructed by him along, an alleged natural watercourse, and to enjoin him from further damming up or diverting the flow of water in such watercourse through the lands of plaintiffs, *held* by REYNOLDS, P. J., that, even though it were established that the creek, along or in connection with which the levee, dam and ditch were constructed, was a natural watercourse, nevertheless defendant's lands being "agricultural lands" and it appearing that the waters from surrounding lands overflowed the south portion of them, defendant was within his rights, under section 6962, Revised Statutes 1899, in constructing the levee, dam and ditch along his own land so as to create a channel for the water, "thus securing proper drainage to such land;" the right given the landowner by the statute being absolute and substantive. *Ib.*
6. **Surface Water: "Dominant Estate" Defined.** A "dominant estate" is property which is situated above or higher than that of a lower, or subservient, estate. *Walther v. Cape Girardeau*, 467.
7. **Same: Dominant Estate: Judicial Protection: Municipal Corporations.** While a private owner of a dominant estate is entitled to judicial protection of his land from illegal acts of the owner of the subservient estate in stopping the flowage of water, a city or other public body, not the owner of a dominant estate, has no right to judicial protection of a claim to the flowage of water, not constituting a public navigable stream. *Ib.*
8. **What Constitutes "Watercourse."** A drain across a lot did not constitute a "watercourse," in a legal sense, where all the water that passed through it was surface water or was led to it through a sewer drain. *Ib.*
9. **Surface Water: Common Law Rule.** The common law rule, that surface water, being a common enemy, every one has a right to protect himself against its flow over or upon his land, prevails in this state. *Ib.*

WILLS.

1. **Life Estate: Power of Disposal: Enlargement to Fee.** If property is by will given to another for life, though with full power of sale in the devisee, the estate is one for life only, and the authority to sell is but a power; the rule being that if a life estate is clearly given, it is not enlarged to a fee by subsequent power of disposal. *Romjue v. Randolph*, 87.
2. **Devise Generally: Power of Sale: Remainder.** If property is by will given to another generally, with full power of disposal,

WILLS—Continued.

the devisee takes an estate in fee, and an attempted limitation of a remainder to a third person is void. But if the property is not given generally to the first taker, but specifically for his life, then a power of sale will not enlarge the life estate into a fee. *Romjue v. Randolph*, 87.

3. **Same: Husband and Wife: Joint Will: Survivor.** A husband and wife, without children of their own, made a joint will containing the following clause: "We each will, bequeath and devise, to the other surviving all the property, real, personal or mixed, of which we or either of us shall die seized, with full power of disposition for and during the life of such survivor." And by a subsequent clause they willed the remainder of their estates to three persons, in equal parts, or their descendants. The husband died first and it was held that the wife took a life estate. And that each gave a life estate to the survivor, and both gave the remainder to the three persons. *Ib.*
4. **Same: Lapse: General Estate.** A husband and wife, without children of their own, made a joint will, whereby they each gave a life estate to the survivor and the remainder to three persons in equal parts, or their descendants. The husband died, and afterwards one of the three devisees died without issue, and then the wife died. It was held, that the devise to the deceased devisee lapsed, since he did not leave descendants. His share of the estate would remain as general estate of the two testators and would go to their statutory heirs in the proportion of the original estate of each of them. *Ib.*
5. **Same: Descendants.** The word "descendants" is held not to mean collateral kin, such as brothers and sisters, but direct issue from the body, including grandchildren to the remotest degree. *Ib.*
6. **Intent of Testator.** In the construction of wills the cardinal rule is to give effect to the true intent and meaning of the testator. *Snorgrass v. Thomas*, 603.
7. **Same.** This can be best ascertained by the courts by putting themselves in the place of the testator and reading all his directions therein in the light of his environment at the time the will was made. *Ib.*
8. **Same.** In order that the court may place itself as near as possible in the place of the testator and read his will from the same standpoint from which it was written, the circumstances surrounding the testator, the subject-matter of the devise, and the persons to be benefited, may be considered in order to determine the objects of his bounty. *Ib.*
9. **Same.** The words "shall lose her husband" are construed to mean, in this case, a cessation of the marital relation whether that event should be occasioned by the death or divorcement of the husband. *Ib.*

WITNESSES. See Negligence, 32.

1. **Civil Case: Secreting Witness: Contract: Public Policy.** It is unlawful both by statute and from principles of public policy, to induce or deter a person from appearing as a witness in a civil case, by secreting him or placing him beyond the jurisdiction of the court, and a contract for such service is void. *Small v. Lowrey*, 108.

WITNESSES—Continued.

2. **Party to Cause: Minor: Secreting Release.** Where a release of a cause of action, upon which suit had been brought, had been obtained from a minor plaintiff, and it was feared such minor might appear at the next term of court to reject the release and prosecute the action, a contract made with defendant and another for the latter, to take the minor out of the state and secrete her until the case had been dismissed, is fraudulent and against public policy, and no recovery can be had for such services. *Ib.*
3. **Unlawful Service: Knowledge: Continued Service.** If one engaged to perform a service, not unlawful, but learns soon after entering upon the performance that it is unlawful, and yet continues to the end, it taints the entire transaction, and no action can be maintained for such service. *Ib.*
4. **Same: Release: Delivery: Compensation.** If one agrees to obtain and deliver a written release of a cause of action from one party to another, and he obtains the release but does not deliver it to the defendant employing him to get it, he cannot recover compensation. *Ib.*
5. **Quaere: Inducing Party to a Cause.** Whether inducing a party to a cause, who is an adult, to keep in hiding so as not to be present when the case is called for trial, is a wrong for which no compensation can be recovered, quaere. *Ib.*
6. **Competency: Privileged Communications: Physician and Patient: Waiver.** Section 6362, Revised Statutes 1909, making a physician incompetent to testify as to certain information acquired from a patient while attending him in a professional character, creates a disqualification which the patient may waive but cannot be compelled to waive. *Edwards v. Railroad*, 428.
7. **Same.** In an action for personal injuries, *held* that plaintiff did not by the testimony she gave at the trial, waive her attending physician's incompetency to testify against her under section 6362, Revised Statutes 1909. *Ib.*
8. **Failure to Call: Physician and Patient: Instructions.** Quaere, whether, in an action for personal injuries, where the plaintiff fails to call as a witness the physician who attended her, the defendant is entitled to have the jury instructed concerning such failure. *Ib.*
9. **Failure to Call: Physician and Patient: Instructions.** In an action for personal injuries, a requested instruction, that plaintiff's failure to call her attending physician to testify to the extent of her injuries might be considered by the jury as a "strong circumstance" against her, was properly refused. *Ib.*
10. **Remarks of Court.** The remark of the trial judge that it would be fair to a witness to be permitted to read a statement before she made answer to a question concerning its contents, was not prejudicial. *Hutton v. Street Railway*, 645.
11. **Hypothetical Question.** It is not error to allow a doctor to answer, a hypothetical question as to whether, under the facts in evidence, the injury to plaintiff in falling from the car could have produced the condition he found her in when he examined her, that: "It could, that kind of a fall." *Ib.*

Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall

KANSAS CITY COURT OF APPEALS.

content that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed. When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (e. g.): "*Summons issued on the — day of —, 188—, executed on the — day of —, 188—*," and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions

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presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

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RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—Extending Time for Filing Statement, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

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RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the _____ day of _____ 190—, executed on the _____ day of _____, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstracts above referred to and of any

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objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript-record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

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the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

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Authorities incorrectly cited as to book, page or title of case, will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. See *Barnett et al. v. Colonial Hotel B. Co.*, 119 S. W. 471; 137 Mo. App. 636.

Rule 24 is hereby amended to read as follows:

Rule 24.—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

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Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

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ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule. 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

Rule 34. An appellant having filed a certified copy of the order granting an appeal,

(a) Need not abstract the record entries showing the steps taken in the trial court to perfect such appeal. If the abstract

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states that the appeal was duly taken, then, absent a certified transcript of the record showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.

(b) No appellant or plaintiff in error need abstract record entries evidencing his leave to file or various extensions of time granted for filing, a bill of exceptions, but it will be sufficient if his abstract states that the bill of exceptions was duly filed.

The burden, in either of the above paragraphs a or b, will then be upon the respondent or, in writs of error, upon defendant in error, to produce in this court a transcript of the record, or of as much thereof as is necessary, duly certified by the clerk of the trial court, showing the contrary to be the fact, if he make the point.

(c) When the respondent or defendant in error desires to challenge the abstract of the record for any of the above defects, he shall give notice in writing to the opposite counsel, which notice shall be served upon such counsel within ten days after the abstract has been served, failing which, no such objection will be entertained. Such notice, shall, at least five days after service thereof, be filed with the clerk of this court, together with certified transcript of record above required.

[Adopted December 14, 1912.]

RULES OF PRACTICE

IN THE

SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove.

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then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions In Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty

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days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just. (Amended January 3, 1911, to take effect February 1, 1911.)

RULE 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2043, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record nec-

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essary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Continuing and Resetting Cases. No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st, 1910.)

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard

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from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion; and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmance under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

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RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

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When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

Adopted this 19th day of August, 1909.

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